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A Unique Legal Institution

THE official inauguration of the Academy of International Law at The Hague, founded with the support of the Carnegie Endowment for International Peace, took place on July 14, under the auspices of The Netherlands government and in the presence of the representatives of the government and of great international institutions, and of distinguished university men, judges and barristers.

This institution, which avowedly is established for the intellectual *élite* of the nations, was suggested in 1907 on the occasion of the second Peace Conference. It was intended to inaugurate it in the summer of 1914 and to begin actual work the following year, but the World War prevented it. Now for the first time since the return of peace it has been found possible to start the Academy on its way. According to its statute, this unique institution is to be a center of higher studies in international law, public and private, and cognate sciences, "in order to facilitate a thorough and impartial examination of questions bearing on international juridical relations." The most competent men of various nations will be invited to teach through regular courses, lectures or seminaries, the most important matters, from the point of view of theory and practice, of international legislation and jurisprudence. The courses are to be held in summer, from July to October, during the period which coincides with the long vacation in universities, and holidays in general, in order to secure the cooperation of all competent persons and give facilities to learners from every country. Those who desire to enter the Academy must apply for admission, either direct or through the medium of the diplomatic or consular authorities of their country, to the Board at The Hague.

The program for the teaching for 1923 embraces two periods and the list of teachers and lecturers embraces distinguished names both in Europe and America. Lord Phillimore is on it for six lessons on "The Rights and Fundamental Duties of States"; James Brown Scott, for ten lessons on "The Conduct of Foreign Affairs in Democratic Governments"; Dr. B. Loder, President of the Permanent Court of International Justice. for one lecture on "Abitration and International Justice"; Nicholas Murray Butler, for a lecture on "The Development of the International Mind." Among the other members of the faculty for the 1923 lectures are to be noted Prof. Grafton Wilson of Harvard, Mr. Ellery C. Stowell, Mr. Edwin M. Borchard of Yale University, and Mr. James Wilford Garner of the University of Illinois.

Bar Unification in Alabama

THE Alabama General Assembly has finally passed the State Bar Unification Bill which was championed by the Bar Association of that commonwealth. The Act provides for a Board of Commissioners as the governing body of the unified bar, to be selected by ballot by the members of the State Bar by judicial districts. The Board has power to determine the qualifications and requirements for admission to the practice of law and to conduct, through a board of examiners, the examination of applicants. The educational qualifications of applicants and the subjects to be examined upon, however, shall be as now provided by law or as hereafter so provided.

The Board has also extensive disciplinary powers. It has the right to appoint committees to take evidence and recommend action by the Board, but in all cases involving suspension, exclusion or disbarment, the testimony must be taken at the Court House of the county of the residence of the party charged. It may impose a public or private reprimand, suspension from the practice or exclusion or disbarment therefrom, but the exclusion or disbarment penalties require a three-fourths vote. The Supreme Court may, and on peti-

tion of the party aggrieved must, in any case of suspension or disbarment from practice, review the action of the Board. It may also on its own motion, and without the certification of any record, inquire into the merits of the case and take any action agreeable to its judgment. The Board of Examiners on Admission to the Bar is to consist of three members, to be appointed by the Board of Commissioners.

A license fee of five dollars is to be paid annually by each member of the State Bar, which, together with a fee of ten dollars payable by all applicants for admission, shall constitute a fund to be administered by the Board of Commissioners. The rules and regulations adopted by the Board relative to disbarment or admission to the bar, shall not become effective until approved by the Supreme Court. The Board and any committee appointed by it are given the power of subpoena to compel attendance of witnesses and the production of books and papers.

Passing of a Notable Figure

NEWS of the sudden death on July 9 of former Associate Justice William R. Day, of the U. S. Supreme Court, came as a shock to the public. Secretary of State and intimate friend of William McKinley, Chairman of the United States Peace Commissioners who met the Commissioners of Spain in Paris to end the Spanish-American War, Associate Justice of the United States Supreme Court, after long and notable judicial service in other positions, finally honored by appointment as umpire of the Mixed Claims Commission set up to settle claims arising from the war, Judge Day for more than a quarter of a century was a conspicuous figure in the nation's life. It is expected to present in an early issue a suitable account of a career so distinguished and one which reflected so much credit on the profession to which he belonged.

It should be a source of singular satisfaction to the bar that not many months before his death Judge Day was afforded evidence of the profession's appreciation of his distinguished services. On December 21, 1922, Hon. James M. Beck, Solicitor-General of the United States, as a chairman of a provisional committee of the District of Columbia and the Supreme Court Bars, addressed a letter to him asking him to be their guest at a dinner. Therein he conveyed "their unanimous opinion that your resignation of the office which you filled for nearly twenty years with so much distinction and conspicuous usefulness to our country, should not be permitted to pass without some expression by the bar of its deep appreciation of the great service which you have rendered as an Associate Justice of the Supreme Court of the United States." He added, "this sentiment is shared by the American bar, and as an evidence of the admiration which is felt throughout the nation for your great learning and probity, the president of the American Bar Association, its other officers and Executive Council, desire to be associated with a committee of which I am chairman in this tribute of appreciation of the great service that you have rendered the United States in one of the most critical periods of its history, as a great and wise judge, who always held the scales of justice in an even balance."

Justice Day replied expressing his appreciation of the letter and stating that he would confer with the chairman later and fix a time which he trusted would be mutually satisfactory. We understand that he never found it possible to name a date for this function, but he at least had the satisfaction which this evidence of the esteem in which he was held must naturally have afforded him.

Commercial Law League Convention

THE Commercial Law League of America held its twenty-ninth annual meeting at West Baden, July 16-19, inclusive. The convention was formally opened at 3 P. M., July 16, at which time addresses of welcome were given and responses made. On Tuesday President Thad M. Talcott, Jr., of South Bend, delivered his address. Committee reports followed, after which Mr. Andrew F. Sherriff of the Chicago, Illinois, bar delivered an address on "The Tyrant of Democracy," under the auspices of The National Security League. In the evening there was the annual reception to officers and their wives, and the annual ball. On Wednesday Wheeler P. Bloodgood of the Milwaukee, Wisconsin, bar spoke on "The National Defense Act," and Hon. James E. Watson, United Senator from Indiana, delivered the annual address. On Thursday Hon. R. E. L. Saner of the Dallas, Texas, bar, Chairman of the American Citizenship Committee of the American Bar Association, delivered an address on "Remove Not the Ancient Landmarks Which Thy Fathers Have Set." At each of the principal sessions of the League reports of important committees were made and discussed. These, together with the addresses, made up a program of unusual interest and importance. The social features of the convention were numerous.

LIMIT OF STATE AND FEDERAL JURISDICTION

Basic Principles as to Limitation and Separation of These Two Jurisdictions Would Seem to Be Easily Understood, but the History of the Development of Federal Jurisprudence as Written in the Supreme Court Reports Shows that the Problem Has Demanded Frequent Consideration*

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THE judicial power of the United States is conferred solely by the express provisions of the Federal Constitution and whatever of judicial powers are not thereby conferred upon the federal judiciary are withheld, reserved and guaranteed to the several states by the Tenth Amendment to the Constitution, which provides that powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people.

This amendment applies to the exercise of judicial power just the same as to the exercise of any other powers granted by the Constitution to the National Government—therefore, the principles basic to the limitation and separation of state and federal jurisdiction would seem to be of easy understanding.

Stated in plain concise language, the Federal Constitution confers judicial power upon the United States in all cases involving a federal question and in cases of diversity of citizenship.

What constitutes a federal question must be determined from the provisions of section 2 of Article III of the Constitution of the United States. This section provides, in substance, that the judicial power extend to all cases in law and equity arising under the Constitution, the laws of the United States and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, between a state and citizen of another state, between citizens of different states, between citizens of the same state claiming lands under grants of different states and between a state or its citizens and foreign states, citizens or subjects. This section further provides that when the state is a party the Supreme Court shall have original jurisdiction.

The history of the development of federal jurisprudence as written in the reports of the Supreme Court has more than an academic interest. The reader of this judicial history who fails to appreciate the potent influence of the Supreme Court of the United States in shaping the destiny of this republic, must be dull of understanding or lacking in the power of reasoning from cause to effect. Every lawyer may justly take a pardonable pride in the knowledge that his profession, as represented upon that court, in the infancy of our republic, has not merely contributed to its normal development, but in truth and in fact has been the dominant force that preserved its integrity, nurtured its vitality and made possible its perpetuity, in defiance of the attacks of its enemies and the mistakes of its friends.

The task was a difficult one. Its accomplishment demanded not only intelligence of a high, discriminating character, but brave hearts and that indomitable spirit willing to sacrifice self; willing to bear the contumely of bitter and unwarranted attacks, not only upon the court, but also upon the personal integrity and honesty of purpose of the individual judges. These attacks were not few and far between. On the contrary the states watched with jealous eye every assertion of power on the part of the federal judiciary and unless the assertion of that power was pleasing to sectional prejudices, the court and the individual members thereof became the targets of violent and unrestrained abuse.

Shortly after the adoption of the Constitution a number of suits were brought in the Supreme Court of the United States against States of the Union by citizens of other states. Perhaps the first of these to be decided was Chisholm, Executor, v. Georgia, 2nd Dallas, 410. Mr. Edmund Randolph, Attorney General of the United States, in presenting his argument in this case, in favor of the court's jurisdiction, deplored the fact that his official duties required him to represent the unpopular side of the controversy. This was especially objectionable to him because his own state, Virginia, had condemned this attempted exercise of federal jurisdiction as incompatible with state sovereignty.

In view of the specific language of the Constitution the question presented in the Chisholm case was not, in any sense, an involved or intricate one; nevertheless, the report of this case is intensely interesting by reason of the several exhaustive opinions in which the relation of the federal government to the several states was, perhaps for the first time, fully analyzed, discussed and determined. The court found nothing helpful in the jurisprudence of the old world. The Amphictyonic Council, Achaean Confederacy, the more modern Helvetic Union and other European historical governmental adventures in confederacy of states, were held not to be of sufficient likeness to our own to justify any analogical application.

The conclusion of the court sustaining its jurisdiction, was eventually based solely on the provision of the federal constitution, but Chief Justice Jay in concurring in this conclusion said: "Lest I should be understood in a latitude beyond my meaning, I think it is necessary to subjoin this caution, viz: that such jurisdiction may nevertheless not extend to all demands and to every kind of action. There may be some exception."

The result reached in this case was so obnoxious to state pride and so at war with public sentiment in all the states of the Union that shortly thereafter the

*Address delivered before the Cleveland, Ohio, Bar Association, Feb. 20, 1923.

Eleventh Amendment to the Constitution was adopted. This amendment provides in terms that the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the states by citizens of other states or by citizens or subjects of any foreign state, so that, as limited by the Tenth Amendment and modified by the Eleventh Amendment, Section 2 of Article III of the Constitution specifically limits and specifically enumerates the judicial power of the federal government.

But the opposition to the judgment reached in these cases was but trivial as compared with the opposition that followed the later exercise of federal jurisdiction that in any way affected the sovereign power of the state, notwithstanding the state had surrendered and granted to the federal government definite and distinct governmental powers that necessarily included the means for the exercise of that power and without which the United States could not have survived the first spasm of sectional selfishness. In short the federal judiciary was then the only guardian and protector of the principles for which so many brave men later sacrificed their lives on Southern battlefields.

While Congress was seething with sectional prejudices, while day after day treasonable speeches profaned its halls, the Supreme Court stood firm in its purpose to enforce the terms, meaning and intent of the federal constitution, regardless of the calumny being heaped upon it.

Nor were these attacks upon the basic principles of the federal government limited to any one geographical section of the country. In the final struggle against the folly and crime of secession, the North stood firm and unyielding; nevertheless, in the earlier life of our Republic it did not hesitate to assert principles just as deadly to our national existence. New York, Pennsylvania, Wisconsin, California, yes, even our own State of Ohio was by no means guiltless of offense.

The Constitution vests the judicial power granted to the federal government in one Supreme Court and in such inferior courts as Congress may, from time to time ordain and establish. Original jurisdiction is conferred by the Constitution upon the Supreme Court in all cases affecting ambassadors, other public ministers and consuls, and cases in which a state shall be a party, except as modified by the Eleventh Amendment. In all other cases the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as Congress shall make.

In pursuance of this delegation of power Congress has established inferior courts and conferred jurisdiction upon these courts in controversies coming within the constitutional grant of judicial powers and has also provided the procedure of cases brought in the state court involving a federal question or where there is a diversity of citizenship.

These statutes, exemplify the many phases and ultimate scope of federal jurisdiction within the meaning and intent of Sec. 2 of Article III of the Federal Constitution.

It is, of course, impossible to refer to these statutes in detail, or to the many provisions, limitations and conditions therein written. Aided however, by the interpretation by Congress, as appears by these statutes, federal jurisdiction, both concurrent and exclusive, includes:

All suits of a civil nature at common law or in equity brought by the United States or its authorized officers; between citizens of the same state claiming lands under grants from different states, or where the matter in controversy exceeds exclusive of interest and cost, the sum or value of $3,000, and

(a) arises under the Constitution or the laws of the United States or treaties made, or which shall be made under their authority or,

(b) is between citizens of different states or

(c) is between citizens of a state and foreign states, citizens or subjects.

All suits under any law relating to the slave trade.

All cases under internal revenue, customs and tonnage laws.

All suits under postal laws.

All suits for violation of interstate commerce laws.

All suits by the assignee of any debenture for drawback of duties issued under any law for the collection of duties, against the person to whom such debenture was originally granted or against any indorser thereof to recover the amount of such debenture.

All suits for injury on account of accidents under the laws of the United States.

All suits concerning civil rights or privileges of citizens of the United States or the deprivation of such rights by any act done in furtherance of a conspiracy for that purpose.

All suits against persons having knowledge of such conspiracy and having power to prevent or aid in preventing the same, who neglect or refuse so to do.

All suits to redress the deprivation of civil rights under color of law.

All suits to recover certain offices wherein it appears that the sole question touching the title to such office arises out of the denial of the right to vote to any citizen on account of race, color or previous condition of servitude.

Certain suits against national banking associations.

All suits by aliens for torts in violation of the law of nations or of a treaty of the United States.

Certain suits against the United States.

All suits for the unlawful inclosure of public lands.

All suits under immigration and contract labor laws.

All suits against trusts, monopolies and unlawful combinations.

All suits concerning allotment of lands to Indians.

All partition suits where the United States is joint tenant and appellate jurisdiction to review, revise, reverse or modify orders made by federal boards and commissioners created by federal statute.

The Supreme Court of the United States also has jurisdiction upon writ of error or certiorari to re-examine, reverse or affirm the final judgment or decree in any suit, in the highest court of a state in which a decision could be had, where is drawn in question the validity of a treaty or statute of or an authority exercised under the United States, or where is drawn in question the validity of a statute of or an authority exercised under any state on the ground of their being repugnant to the Constitution, treaties or laws of the United States or where any title, right, privilege or immunity is claimed under the Constitution or any

treaty or statute or commission held or already exercised under the United States.[1]

It is further provided by statute that the jurisdiction of the federal courts is exclusive of the courts of the several states in the following matters:

All crimes and offenses cognizable under the authority of the United States.

All suits for penalties and forfeitures incurred under the laws of the United States.

All civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it.

All seizures under the laws of the United States, on land or on waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize.

All cases arising under the patent-right or copyright laws of the United States.

All matters and proceedings in bankruptcy.

All controversies of a civil nature, where a state is a party, except between a state and its citizens, or between a state and citizens of other states, or aliens.

All suits and proceedings against ambassadors, or other public ministers, or their domestic servants, or against consuls or vice-consuls.

The construction of the several acts of congress relating to Federal jurisdiction, in harmony with the constitutional grant of judicial power, has been fraught with many difficulties and uncertainties, especially in the earlier history of federal jurisprudence .

The exercise by the Supreme Court of the power to review the final judgment of the highest court of a state in which a decision could be had, was bitterly antagonized by the states, notwithstanding the Supreme Court in the case of Commercial Bank of Cincinnati v. Buckingham, Executor, held that before the federal supreme court would review the decision of the highest court of a state, it must appear on the face of the record that a federal question was presented and decided in the state court and that under no circumstances would it review a judgment of a state court where that court had merely decided the application of the law to the facts involved, regardless of how erroneous that judgment might be.

Shortly after this the case of the Piqua Branch of the State Bank of Ohio v. Jacob Knoop, Treasurer of Miami County, 16 Howard, 369, was decided by the Federal Supreme Court upon a writ of error from the Supreme Court of Ohio. This involved the validity of a state statute in reference to taxing banks contrary to the provision in their charter. In this case it was held by the Supreme Court that the charter of a bank was a legislative contract and could not be changed without its assent; that the statute of Ohio purporting to do this was void because in conflict with the federal constitution. This decision was bitterly attacked in Ohio and many newspapers called attention to the fact that it was not merely an invasion of state rights but a lethal blow against state sovereignty.

This case was followed by Dodge v. Wolsey, 18 Howard 331. After the Piqua Branch suit had been decided, Ohio amended its constitution for the purpose of accomplishing the result attempted by statute, but the United States Supreme Court held that a state could neither by its constitution nor by its laws impair the obligations of contracts.

This decision, and the decision in the Piqua case, provoked such bitter antagonism that the Supreme Court of Ohio refused to enter a mandate in the Piqua case for two years after the date of that decision. It was finally entered upon the order of only three of the state supreme judges. About the same time the Supreme Court of California refused to allow a writ of error to the Supreme Court of the United States on the ground that the allowing of such writ would be a surrender of the power which belongs to the sovereignty of the state (Johnson v. Gordon, 4th Cal. 368.).

Following the decision in Green v. Biddle, holding the Kentucky Land Laws unconstitutional, Kentucky joined in the feud against what is called "The Federal Usurpation of Judicial Powers." In fact in many of the states both north and south, abuse of the federal judiciary became a very popular pastime.

The opposition to the exercise of federal judicial powers in all suits under laws relating to the slave trade reached such proportions that it would be impossible to discuss it in detail. One of the earliest of these cases is known as the Booth case. Booth was charged with the violation of the Federal Fugitive Slave Law. Immediately a writ of habeas corpus was issued out of the Supreme Court of Wisconsin upon the theory that the federal statute was unconstitutional and that court so held. A writ of error was prosecuted to the United States Supreme Court, which court sustained the validity of the law. Booth was tried, convicted and sentenced in the United States District Court but was again released on another writ of habeas corpus issued by the Wisconsin state Supreme Court. Wisconsin was supported in its defiance of federal authority by practically every anti-slavery state, nevertheless, the Supreme Court held that its decree was final and conclusive of the question of the constitutionality of the Fugitive Slave law. About the same time Ohio again manifested its opposition to federal judicial power in what are known as the Oberlin Rescue Cases. The defendants were convicted of a violation of the Fugitive Slave Law in the United States District Court. The Supreme Court of Ohio issued writs of habeas corpus based on the claim that the law was unconstitutional, but later sustained its validity. U. S. v. Bushnell, U. S. v. Langslow and Ex Parte Bushnell 9 Ohio State 77, 325.

The historic Dred Scott case did not involve any question of conflict of jurisdiction between the state and federal court. Scott, a former slave, commenced an action of trespass *vi et armis* in the United States Circuit Court for the District of Missouri against Sanford, who claimed to be the owner of Scott, his wife and two children. A plea to the jurisdiction was interposed by Sanford upon the theory that Scott, being a slave of pure African blood, was not a citizen of Missouri, although domiciled therein. The Federal Circuit Court overruled this plea and this was reversed by the Supreme Court in Scott v. Sanford, 19 Howard 393. The popular indignation in the North, the storm of abuse of the Supreme Court, and particularly of Chief Justice Taney, who wrote the opinion, was not based upon the claim of lack of judicial power, but rather upon the anti-slavery sentiment. This decision perhaps, more than any other one cause precipitated the civil war for the determination of the long disputed question of state rights.

In this connection it is interesting to note that the opposition of the North to a judgment of the Supreme

1. Until the amendment of 1916 the supreme court had no authority to review the judgment of the state court unless that decision was against the validity of a treaty, statute of or an authority exercised under the United States, or in favor of the validity of the statute of or an authority exercised under any state, challenged as being repugnant to the Federal Constitution.

Court became a potential factor in uniting the North in support of the supremacy and perpetuity of the federal government—propositions so many times declared by the same court and violently opposed by many of the same states.

In modern times the activities of the Federal Government have increased to such an extent that there are constantly new jurisdictional questions arising. Especially is this true since the adoption of the Fourteenth Amendment, which has very greatly enlarged, not the judicial power, but the scope of litigation coming within federal jurisdiction. By reason of the fact that the prohibition of that amendment is directed against the state and not against individuals it presented a serious question as to the jurisdiction of the federal courts to enforce the same as against the statute of a state except in the Supreme Court upon writ of error from the final judgment or decree of the highest court of a state in which a decision in the suit could be had, in a cause wherein the validity of a state statute was challenged on the ground that it was repugnant to the Fourteenth Amendment.

In Virginia v. Rives, 100 U. S., 313, it was held that the provisions of the Fourteenth Amendment were broad enough to bring such controversies within the jurisdiction of the federal court but that the statute providing for the removal into the federal court of any civil suit or prosecution commenced in any state court, did not in terms authorize such removal and for that reason the cause was remanded to the state court. In Ex Parte Virginia, 100 U. S. 339, it was held that while the prohibition of the Fourteenth Amendment had exclusive reference to state action nevertheless, the state might assert its authority through different agencies; that a state cannot exercise its governmental power through its courts or any other agency in disregard of the authority granted the Federal Government; that every grant of power to the general government is carved out of state rights and involves a corresponding diminution of the governmental powers of the state. Based upon these propositions it was further held in that case that a judge might be prosecuted in the federal courts for excluding jurors of African race and black in color, yet possessing the qualifications of jurors required by law.

It has also been claimed that if in a state where neither its constitution nor its laws offend against the Fourteenth Amendment, any person is deprived of his rights as a citizen, it is due to the fault or misconduct of individuals for which the state is not responsible and therefore the federal courts have no original jurisdiction. It was not until 1913 that this question was definitely settled by the Supreme Court in Telephone and Telegraph Company v. Los Angeles, 227 U. S. 278, in which case it was held that one whose rights, protected by the Federal Constitution, are invaded by state officers claiming to act under a state statute, is not debarred from seeking relief in federal court under the Federal Constitution until after the state court has declared that the acts were authorized by the statute; that the federal judicial power can redress violations of the Fourteenth Amendment by a state officer misusing the authority of a state with which he is clothed and that under such circumstances inquiry whether the state has authorized the wrong is irrelevant.

This would seem to be in direct conflict with the conclusion reached in Barney v. New York, 193 U. S. 430, in which it was held that where the jurisdiction of the federal court is invoked on the ground of deprivation of property without due process of law in violation of the Fourteenth Amendment it must affirmatively appear that the alleged deprivation was by act of the state. The court in its opinion in the Los Angeles Telephone case distinguished the Barney case upon the hypothesis that the facts there presented took that case out of the rule as established in Raymond v. Tractor Co., 207 U. S. 20, and Ex parte Young, 209 U. S. 123.

While the jurisdiction of the federal courts extends to all cases in law and equity arising under the laws of the United States, yet Congress may not in the exercise of federal power assert authority wholly reserved to the states. Such a law would confer no power upon the federal courts further than the authority to declare it unconstitutional and void; yet Congress may select the subjects of taxation in the exercise of the power conferred upon it to levy excise taxes having uniform operation throughout the United States, and if the legislation so enacted has some reasonable relation to the exercise of the taxing authority the motive of Congress is not important. (License Taxing Cases 5 Wall 462, 471.)

Such laws are constitutional, although the same business may be regulated by the police power of a state. This principle was applied by the Supreme Court in sustaining a tax upon intoxicating liquor, upon a state bank issue of circulating notes, upon oleomargarine and other like matters.

The so-called, Harrison Narcotic Drug Act was attacked as unconstitutional upon the theory that it involved moral considerations only and was therefore a direct interference with the police power of the states to control their domestic affairs, but the Supreme Court held in U. S. v. Doremus, 249 U. S. 86, that this Act has some reasonable relation to the exercise of the taxing power conferred on Congress by the Constitution and sustained its constitutionality.

The constitutionality of the Pure Food and Drug Act was sustained because the provisions of that Act apply only to interstate commerce, a subject wholly within the control of Congress.

An Act of Congress for the protection of migratory birds was held unconstitutional but after a treaty was made between the United States and Canada, which treaty included an agreement to protect migratory birds, the law was held constitutional as being within the power of Congress to make and enforce treaties with foreign powers.

The statute of the United States provides in terms that the jurisdiction vested in the courts of the United States in all cases arising under the patent and copyright laws shall be exclusive of the courts of the several states, nevertheless, the question is now practically settled that when suit is brought in a state court to recover the purchase price of a patent, or upon a contract for the payment of royalties, the defense of the invalidity of the patent may be interposed and for the purposes of that suit the state court has jurisdiction to determine that question.

The Act of Congress conferring appellate jurisdiction to review, revise, reverse or modify orders made by the federal boards and commissions created by federal statute, while clearly comprehended within the constitutional grant of judicial power, has nevertheless brought within the appellate jurisdiction of the federal courts subjects that were heretofore supposed to be exclusively within the cognizance of state jurisdiction.

In the Minnesota Rate cases, 230 U. S. 353, it was held that the power of a state to fix intrastate

rates for transportation of passengers and freight is limited by the constitutional power of Congress with respect to Interstate Commerce and its instruments and that when the situation becomes such that adequate regulation of interstate rates cannot be maintained without imposing requirements with respect to such intrastate rates, it is for Congress to determine, within its constitutional authority, the measure of regulation to be applied.

This was followed in the Shreveport case, 234 U. S. 342, in which it was held that the Interstate Commerce Commission has authority to deal with intrastate rates constituting an unjust discrimination against interstate commerce in specific localities subject to substantially similar conditions of transportation. This was followed by the Illinois Central case, 245 U. S. 503, in which it was held that a carrier may disregard intrastate rates fixed by state authorities where such rates result in unjust discrimination against interstate commerce, and recently in the case of Public Utilities Commission of Ohio v. The Cincinnati Northern Ry. Co. a federal district court sustained an order of the Interstate Commerce Commission which practically fixed intrastate rates on lines engaged in transportation of freight and passengers wholly within the state, including even the transportation of milk and cream from adjacent farms to cities in the interior of the state.

The comprehensive grant of judicial power to the federal government in all admiralty cases also presented, in practical application, many interesting phases. It was contended that under this provision of the Constitution the admiralty jurisdiction of the United States extended only to the high seas and to the ebb and flow of tide waters in the rivers opening to the sea.

The case of Gibbons v. Ogden, 9 Wheaton 1, was the first important case involving the extent of the federal maritime power in connection with interstate and foreign commerce. This action involved the validity of a grant by the state of New York to Livingston and Fulton of the exclusive right to navigate all the waters within the jurisdiction of that state. The Supreme Court held that this statute was void because repugnant to the clause of the Constitution authorizing Congress to regulate commerce, and New York joined the other states, heretofore mentioned, in their opposition to the usurpation of powers by the federal judiciary.

Following this there were a number of cases holding that the federal admiralty jurisdiction extended to all inland rivers, navigable to the sea. Later it was declared by a statute relating to the jurisdiction of district courts that the federal jurisdiction in admiralty extended to the Great Lakes and to all inland navigable waters, furnishing a highway for the transportation of interstate or foreign commerce. This was held necessary to the exercise of the power granted to congress by Section 8 of Article 1 to regulate and control interstate and foreign commerce. Upon the same theory it has been held that federal jurisdiction extends not only to the Detroit River but to the Erie Canal which is wholly within the state of New York but connects the Great Lakes with the Hudson River.

The question of the admiralty jurisdiction of the courts of the United States is further complicated by the provision in the Act of Congress saving to suitors in all admiralty cases the right of a common law remedy where the common law is competent to give it. In the majority of cases the common law fails to afford a full remedy for the reason that it cannot determine or discharge maritime liens and the property sold upon an execution at common law may be followed in the admiralty courts of the United States and notwithstanding such sale, be subjected to the satisfaction of all maritime liens. Where there are no such liens the remedy is usually adequate.

Two very interesting cases have recently been decided by the Supreme Court in reference to the effect of state statutes upon the admiralty jurisdiction of the federal courts. In Western Fuel Company v. Garcia, Admr. 257 U. S. 226, it was held that where death follows a maritime tort committed upon navigable waters within a state whose statute gives a right of action on account of death by wrongful act, the admiralty courts will entertain a libel in personam for the damages sustained by those to whom such right is given, but that in such cases the state statutes of limitation are applicable.

In the case of Grant, Smith, Porter Co. v. Rhode, 257 U. S. 469, it was held where both parties had accepted the Oregon Compensation Law that the exclusive features of that Act abrogated the right of the employe to recover damages in an admiralty court for injury sustained through his employer's negligence while engaged in construction work on a ship nearly completed and launched in navigable waters in the United States, in the State of Oregon. In a recent case decided by the Sixth Circuit Court of Appeals, (The Whisper, 268 Fed. 464), a rather sharp line is drawn between state and federal jurisdiction. The action was one for damages for an unlawful assault and battery by the master upon one of the seamen. The vessel was a freight and passenger steamer upon the Mississippi River. While it was discharging freight consigned to Upper Turnages Landing in Arkansas and while a seaman was performing the duties assigned to him the master of the vessel assaulted and beat him with an iron pipe. Immediately after this occurrence the seaman left the boat and was some distance away from the wharf on the shore assisting other seamen in rolling a barrel of sugar, which had been part of the ship's cargo, up the grade to the level above the bank. In doing this the seaman's foot slipped and he pulled two or three other men down with him. The master who had followed him ashore, thereupon again assaulted him and beat him more severely than he had beaten him upon the boat. The court held that these were two separate assaults. The one upon the vessel was within the jurisdiction of admiralty and the one upon the shore within the jurisdiction of the state courts.

In all cases where prior to the grant of Federal Judicial power state courts had jurisdiction over the subject matter of a suit, such courts will retain concurrent jurisdiction with the federal courts until Congress by express provision revokes and extinguishes the same. It is a settled rule that, in cases not removable under the statute, when a federal court and a state court may each take jurisdiction of a matter in controversy the tribunal whose jurisdiction first attaches holds it to the exclusion of the other until the jurisdiction involved is exhausted. This rule however, is limited to actions which deal either with the rem or potentially with specific property and does not apply to actions strictly in personam.

The question of concurrent jurisdiction of state and federal courts considered in connection with the rule of comity, which comity between Federal and State courts becomes a principle of right and of law and therefore of necessity, (Correl v. Heyman, 111

U. S. 176, 182) has given rise to many subtle and intricate questions, but perhaps the most difficult of all arose under the XVIII Amendment, which provides in terms that Congress and the several states shall have concurrent power to enforce this amendment by appropriate legislation. While it was recognized that each state had the inherent authority to prohibit, by constitutional provision and legislative enactment, the manufacture and traffic in intoxicating liquor within the state, except in so far as such prohibition might interfere with interstate commerce; that each state had the authority to enact legislation in reference to the control and conduct of its domestic affairs in so far as such legislation did not conflict with the federal constitution; and that in the course of state and federal legislation the same act might be declared an offense against the state and against the nation and subject to punishment in both jurisdictions, yet the XVIII Amendment, seemed to present an entirely different situation by reason of the fact that it directly authorized a state to enforce its provisions by appropriate legislation. It was therefore contended that, if an Act of Congress and a law enacted by a state legislature were alike directed to the enforcement of the XVIII Amendment and alike authorized by that amendment, each of these laws was an exercise of the same identical power by the state legislature and by congress and that a conviction or acquittal in one jurisdiction would be a bar to a prosecution in the other. This argument was not only persuasive but was convincing to some of the federal courts of inferior jurisdiction.

On December 11, 1922, the Supreme Court held in United States v. Lanza, that the appropriate legislation by Congress to enforce the XVIII Amendment, known as the National Prohibition Act, declared an offense against the United States; that appropriate legislation by the several states to enforce the same amendment to the Federal Constitution was within the competency of the state sovereign authority to prohibit the manufacture and sale of intoxicating liquor; that the same act constituted a separate offense against the state and against the United States and might be punished in both jurisdiction and that a formal acquittal or conviction in one was not a bar to a prosecution in the other.

In support of this conclusion the court cited with approval Fox v. Ohio, 5 Howard 410, in which a judgment of the Supreme Court of Ohio, in a prosecution for uttering counterfeit money in violation of a state law, was under review, quoting from the opinion in that case the following:

> It is almost certain, that, in the benignant spirit in which the institutions both of the State and federal systems are administered, an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other for acts essentially the same, unless indeed this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor. . . .

These, of course, are but a few of the cases involving jurisdictional questions. They may be helpful, but they by no means determine the ultimate limit of state and federal jurisdiction. Nor is it possible to glean from all of the cases a more comprehensive or definite rule for determining this limit, other than that the judicial power of the United States is limited to the specific constitutional grant of such power and extends to cases involving a federal question and to cases of diversity of citizenship, even though no federal question be involved.

Legal Aid Progress

In its annual report to be presented at the Minneapolis meeting, the committee on Legal Aid of the American Bar Association states that progress during the past year has been extremely satisfactory. There are now over forty legal aid organizations in the United States as against thirty for the preceding year. During the past year legal aid societies or bureaus have been established in such important cities as Indianapolis, Albany and Grand Rapids. In 1922 the several legal aid organizations gave advice and assistance to over one hundred and twenty-five thousand people.

The report refers to the convention at Cleveland on June 7 and 8, 1923, of accredited delegates from legal aid organizations in over twenty-five different cities, and states that the National Association of Legal Aid Organizations there established definitely opens a new era in legal aid history. The charter members of the new association unanimously adopted a set of uniform classifications for keeping records of the nature, source and disposition of their cases. It will therefore soon be possible to take a vast number of such cases and analyze them, and studies based on such a comprehensive analysis cannot fail to be a valuable contribution to the subject.

The report further deals with what the bar has done in this regard. Over thirty associations have taken definite action of some sort, and among this number are included the greatest bar associations in the United States. Still other associations have the matter under advisement and presumably will act. Outstanding illustrations of what the bar may accomplish are afforded by Illinois and New York. The New York Legal Aid Society reports that the activities of the state, county and city bar associations have increased its support from lawyers greatly during the past year. In Chicago a special committee of the Bar Association sits with the directors of the Legal Aid Bureau, and throughout the rest of the state a cooperative plan has been evolved by a special committee of the Illinois Bar Association under which in any city or town local charities may refer cases to competent attorneys for attention. On the whole-souled cooperation of the organized bar must largely depend the further success of the movement. The report is signed by Reginald Heber Smith, Chairman; Mary F. Lathrop, Forrest C. Donnell, Robert P. Shick and Allen Wardwell.

Scottish National Law Library

"The Advocates' Library, Edinburgh, which has long occupied, as nearly as possible, the position of a national library for Scotland owing to the facilities generously afforded to students by the members of the Scottish Bar, to whom it belongs, is to become in reality the Scottish National Library. The idea of its nationalisation has been often suggested, and some time ago the Faculty of Advocates gave their consent to such a proposal, but owing to the stern desire for economy then prevailing in high quarters the offer, so generously made, was declined by the Government; but now, as a result of the munificent gift of 100,000 pounds of an Edinburgh gentleman desirous of seeing in his city a great library which should be worthy of Scottish aspirations, the financial difficulties have happily been surmounted, and ere long we are likely to see the Advocates' Library transformed into the desired national institution."—The Law Times, July 7, 1923.

THE CONFISCATION MYTH

Refutation of the Claim that the Application by Germany of the Private Property of Its Citizens Residing in Germany, Which Was Seized in This Country During the War, to the Payment of American Indemnity Claims Against Germany Would Constitute Confiscation of Private Property by the United States

By William Campbell Armstrong
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I. Confiscation in International Law

In ancient times, neither the property nor the lives of aliens were safe, if war broke out between nations, and such aliens and their property were found in an enemy country. Aliens were seized and imprisoned and often sold into slavery or killed, and their property was confiscated. These harsh rules were very gradually mitigated.

In early times, the merchant of a foreign country, even in times of peace, was liable to arrest and his merchandise was often taken from him. The first mitigation of this harsh rule which we know of, is found in an edict of King John of England in Sir Nicholas Nicolas' History of the Royal Navy, Vol. i, page 157 (1847). He said:

> King John is said, soon after his accession, to have given great encouragement to foreign commerce by declaring that all merchants of any nation whatsoever, shall, with their merchandise, have safe conduct, to pass into and repass from England, and to enjoy while there, the same peace and security as the merchants of England were allowed in the country from which such merchants come. (Writs to the Mayor and Commonalty of London and to all Sheriffs of England, April 5, 1st John, i. e. 1200-Hackluyt Ed. 1809, Vol. 1, p.143 "From the Records in the Tower").

This regulation was very similar to one which we will hereinafter consider, although it apparently applied only in times of peace and had for its chief purpose the promotion of international trade and commerce, but this regulation and the many treaties which followed it were more uniformly observed in the breach than in the performance. They were reciprocal and it was always claimed that they had been broken by the enemy.

They amounted to a codification of idealistic ideas as to what should be done in times of war, which men made during intervals of peace and violated as soon as wars occurred.

Thus we find that the first provision for the safety of the lives of enemy aliens found in a country at the outbreak of a war, was contained in the Magna Charta (1215) in the following language:

> Par. 41. All merchants shall have safe and secure exit from England and entry to England, with the right to tarry there and to move about as well by land as by water, for buying and selling by the ancient and right customs, quit from all evil tolls, except (in time of war), such merchants as are of the land at war with us. And if such are found in our land at the beginning of the war, they shall be detained, without injury to their bodies or goods, until information be received by us, or by our chief Justiciar, how the merchants of our land found in the land at war with us are treated: and if our men are safe there, the others shall be safe in our land.

From these provisions in the Magna Charta and the regulations made by King John, and many subsequent treaties between commercial nations, particularly Venice and Genoa, and the other great trading nations of the Middle Ages, it has been argued that the private property of enemy aliens found in a country at the outbreak of war can not be confiscated by the country in which they are found. This rule was never conceded in this country to be in accordance with International Law in the absence of a Treaty.

In 1796, Justice Chase delivered the opinion of the Supreme Court in Ware vs. Hylton, 3 Dallas, 199, p. 220. It appeared that in October, 1777, the Legislature of Virginia passed a law to sequester British property, and further provided that if any citizen of Virginia owed money to a subject of Great Britain, he could pay the same to what corresponded to the modern Alien Property Custodian, and receive a receipt therefor from the State, and he would thereby be discharged from his debt. Pursuant to this law, the defendant in that case paid about £1,000, and was thereafter sued by the British citizen to whom he owed the money and pleaded a payment to the state of Virginia in defense.

The British citizen answered by showing that under the 4th article of the Treaty of Peace with Great Britain of Sept. 3, 1783 (The Jay Treaty), the United States had agreed to restore the confiscated property of British subjects who had not borne arms against the United States.

The 4th Article of the Treaty read as follows:

> It is agreed that *creditors*, on either side, shall meet with no *lawful impediment* to the recovery of the full value, in sterling money, of all *bona fide* debts, *heretofore contracted*.

It was therefore held that a British citizen was entitled to recover the amount of his claim, not under the law of nations, but by reason of the express terms of the treaty, and that Virginia was bound to make compensation to the debtor from whom it had received payment.

Mr. Justice Patterson, one of the framers of the Constitution, in a concurring opinion said (p. 254):

> It has been made a question, whether the confiscation of debts, which were contracted by individuals of different nations in time of peace, and remain due to individuals of the enemy in time of war, is authorized by the law of nations among civilized states? I shall not, however, controvert the position, that, by the rigour of the law of nations, debts of the description just mentioned may be confiscated.

After using the above language, the learned Justice made an eloquent plea for mitigation of the rule. Justice Chase in the opinion of the Court said (p.230):

> Hence it follows, that the restitution of, or compensation for, *British* property confiscated, or extinguished, during the war, by any of the *United States*, could only be provided for by the treaty of peace; and if there had been no provision, respecting these subjects, in the treaty, they could not be agitated *after the treaty* by the *British* Government, much less by her subjects in courts of justice. If a nation, during a war, conducts herself contrary to the law of nations, and no notice is taken of such conduct in the *treaty of peace*, it is thereby so far considered *lawful*, as never afterwards to be revived, or to be a subject of complaint. It is the opinion of the celebrated and

judicious Dr. Rutherforth, that a nation in a *just war* may seize upon any *moveable* goods of any enemy (and he makes no distinction as to *private* debts) but that whilst the war continues, the nation has, *of right*, nothing but the *custody* of the goods taken: and if on peace, no restitution is stipulated, that the *full property of moveable goods*, taken from the enemy during the war, passes, by *tacit* consent, to the nation that takes them. This I collect as the *substance* of his opinion in lib. 2. c. 9 from p. 558 to 573.

The language just used referred principally to the terms of the treaty of peace, but the Court had previously disposed of the proposition that the legislature of Virginia had no right to confiscate any of the property of a Britsh subject.

After holding that Virginia was a Sovereign State, and that the British creditor by the conduct of his sovereign became an enemy to the Commonwealth of Virginia, he said (p. 226):

And thereby his debt was forfeitable to that Government, as a compensation for the damages of an *unjust* war. It appears to me, that every nation at *war* with another is justifiable, *by the general and strict law of nations*, to seize and confiscate all *moveable* property of its enemy (of any kind or nature whatsoever) *wheresoever found*, whether within its territory or not.

In support of this opinion, he cites Bynkershoek Q. I. P. de rebus bellicis., Lib. 1, c. 7, as follows:

Since it is a condition of war, that enemies, by *every right*, may be plundered, and seized upon, it is reasonable that whatever effects of the enemy are found with us, who are his enemy, should change their master, and be confiscated or go *into the treasury*.

He then cites Vattel, Lib. 3, Chapter 81, Sec. 138 of Chapter 9, Section 161:

The *right* to confiscate the property of enemies, during war, is derived from a state of war, and is called the *rights of war*. This right originates from *self-preservation*, and is adopted as one of the means to weaken an enemy and to strengthen ourselves. *Justice*, also, is another pillar on which it may rest, to-wit, a right to reimburse the expense of an *unjust* war.

It was argued in that case that even though private property could be used under the law of nations, debts were placed in an exceptional class.

In the United States vs. Brown (8 Cranch, 107, p. 122), Chief Justice Marshall said:

Respecting the power of Government, no doubt is entertained. That war gives to the Sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded. The mitigations of this rigid rule which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself. That remains undiminished, and when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will.

In U. S. vs. Percheman (7 Peters, pp. 51-86), Chief Justice Marshall referred to the effect of conquest upon the private property of persons in the territory so acquired and said:

The modern usage of nations which has become law, would be violated; that sense of justice and right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other and their rights of property, remain undisturbed. If this be the modern rule even in cases of conquest, who can doubt its application to the use for the amicable cession of territory.

This passage has been cited as indicating a change in the great Chief Justice's views as to the right to confiscate the private property of aliens found in our country during a war, but it will be seen that he was talking about the confiscation of private property in Florida, subsequent to its cession to the United States by Spain. It will be remembered that Florida was a colony of Spain, the acquisition of which by the United States was extremely desirable and it was ceded by a friendly treaty, no dispute having existed between the powers, let alone a war, on the 22nd of February, 1819.

It will therefore be seen that from the time of the creation of this nation, it has been admitted that the private property of enemy aliens in this country could lawfully be sequestered under international law in the event of war; and confiscated after the war, unless some different disposition was agreed to in the Peace Treaty.

II. The Policy of the United States

With a view to the promotion of commerce and friendly relationship between nations, the State Department has negotiated many treaties providing in effect (and in contravention of recognized international law), that private property of resident enemy merchants found in this country at the outbreak of war should not be confiscated, and a reasonable opportunity be given them to leave the country with their goods.

Such was the effect of the Fourth Paragraph of the Jay Treaty, terminating the war with Great Britain, a discussion of which will be found in the letters of Alexander Hamilton (Camillus letters).

A similar treaty was negotiated with the Kingdom of Prussia in 1785, followed by the treaties of 1799 and 1828.

Article XXIII of the Treaties of 1799 and 1828 were identical and provided as follows:

If war should arise between the two contracting parties, *the merchants of either country then residing in the other* shall be allowed to remain nine months to collect their debts and settle their affairs, and may depart freely carrying off all their effects without molestation or hindrance.

Article XXIV of these two treaties was also identical and also provided:

And it is declared that neither the pretense that war dissolves all treaties nor any other whatever, shall be considered as annulling or suspending this and the next preceding article, but on the contrary that the state of war is precisely that for which they were provided, and during which they are to be as sacredly observed as the most acknowledged articles in the law of nature and nations.

From the fact of the existence of these treaties, it has been claimed that there was a general understanding or implied agreement between the United States and Germany, at the outbreak of the war, not to confiscate any of the private property of Germans, whether or not merchants and whether or not residing in the United States, found in the United States, at that time.

The United States Supreme Court, however, in Stoehr vs. Wallace (255 U. S. 239-251-decided Feb. 28, 1921), disposed of this argument and interpreted the treaties strictly (being in contravention of International Law) saying:

The treaty provisions relied on (Art. 23-24 A Stat. 174) relate only to the rights of merchants of either country "residing in the other" when war arises and therefore are *without present application.*

It is a fact that none of the property now in the possession of the Alien Property Custodian was taken from German merchants residing in the United States. It belonged either (1) to German citizens then residing in Germany, or (2) to German citizens (other than merchants) residing in the United States who were interned on the ground that they were aiding or about to aid the enemy.

The interned enemies were permitted to recover their property upon their release, if they signified their intention to continue to reside in the United States.

(Amendments to Trading with the Enemy Act June 20, 1920 and February 7, 1921).

Of course if it appears that any of those interned were actually merchants residing in the United States at the outbreak of the war, it might be contended that they would be entitled to the restoration of their property under the Prussian treaty (Abrogated in express terms by the Berlin Treaty). It is quite clear that no one else has any treaty right thereto.

III. Trading With the Enemy Act

This Act (Chap. 1046, 40 Stat. 411) was passed on October 6, 1917, for the purpose of preserving enemy-owned property in the United States from loss and to prevent any use of it which might be hostile or detrimental to the Government. It was not intended as an Act of Confiscation. It was very similar to the Virginia Sequestration Act of 1777 and other statutes passed by States during the Revolution.

As to its validity, the Supreme Court in Stoehr vs. Wallace (supra) (p. 245) said:

> That Congress in time of war may authorize and provide for the seizure and sequestration through executive channels of property, believed to be enemy owned, if adequate provision be made for return in case of mistake, is not debatable.

See also Junkers vs. Chemical Foundation Inc. (287 Fed. Rep. page 597).

It is therefore clear that the Government legally sequestrated property of German citizens found in the United States on and after October 6, 1917, and still holds the same subject to the direction of Congress as to its disposition, and it may be confiscated (in the absence of Treaty provisions) or returned to its owners, as Congress deems best.

Ordinarily and under the law of nations, as we have seen, the disposition of sequestrated property is determined by the treaty of peace at the conclusion of the war, and that in fact, is what has been attempted in this case.

IV. The Berlin and Versailles Treaties

The Berlin Treaty.—Section 5 of the Treaty of Berlin, signed Aug. 5, 1921, provided as follows:

> All property . . . of all German Nationals, which was, on April 6, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America . . . shall be retained by the United States of America and no disposition thereof made . . . until such time as the Imperial German Government . . . . shall have . . . made suitable provision for the satisfaction of all claims . . . of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered, through the acts of the Imperial German Government . . . since July 31, 1914, loss, damage or injury to their persons or property, directly or indirectly, whether through the ownership of shares of stock in German . . . or other corporations, or in consequence of hostilities or of any operations of war, or otherwise . . .

Article II of Section 1 of the Treaty of Berlin provides for the incorporation into that treaty amongst others of Parts 8 and 10 of the Versailles Treaty. The United States was accorded the "rights and advantages stipulated in that treaty for the benefit of the United States."

Parts 8 and 10 of the Versailles Treaty included the following articles. Section IV of Article 297 (h) (2) reads as follows:

> The proceeds of the property, rights and interests, and the cash assets of German Nationals received by an Allied or Associated Power shall be subject to disposal by such Power in accordance with its laws and regulations and may be applied in payment of the claims and debts defined by this Article or Paragraph 4 of the Annex hereto.

Article 297 (i) Section IV provides:

> Germany undertakes to compensate its Nationals in respect of the sale or retention of their property, rights or interests in Allied or Associated States.

Paragraph 4 of the annex to Part X, Section IV provides:

> All property, rights, and interests of German Nationals within the territory of any Allied or Associated Power and the net proceeds of their sale, liquidation or other dealing therewith may be charged by that Allied or Associated Power in the first place with payment of amounts due in respect of claims by the Nationals of that Allied or Associated Power with regard to their property, rights and interest including companies and associations in which they are interested in German territory, or debts owing to them by German Nationals, and with payment of claims growing out of acts committed by the German Government or by any German authorities since July 31, 1914, and before that Allied or Associated Power entered into the war.

Paragraph 1 of the Annex to Section IV validated and confirmed all actions taken by any of the Allied or Associated Powers in pursuance of war legislation in regard to enemy rights and interests.

Paragraph 2 of the Annex to Part X, Section IV, provided that no German National could make or bring any claim or action against any Allied or Associated Power in "respect of any act or omission with regard to his property, rights or interests during the war or in preparation for the war."

Articles 282 to 289 inclusive, abrogated all prior treaties not revived within six months.

V. The Effect of the Peace Treaty

It seems clear from a consideration of the terms of the above mentioned treaties, that a specific, definite and legal arrangement has been made between the Governments of the United States and Germany for the payment of the claims of the United States and its citizens against Germany, and in this connection it will be interesting to consider the opinions of leading authorities on International Law.

Hon. Wilbur J. Carr, Chief of the Consular Service said:

> In this instance, however, Germany assumed the responsibility for reimbursement of her own nationals for property retained by the Allied and Associated Governments and hence there is not involved a technical case of confiscation. (Hearing on S. J. Res. 225 before the Senate Committee on the Judiciary, January 10, 1923, p. 47).

It has often been suggested that President Wilson when in Paris, took the position that the United States would not make any claim for reparations. This is undoubtedly true, but he distinctly stipulated that we should insist on having indemnity for pre-war damages.

The following is an extract from a statement made by Mr. Wilson at a conference with the Foreign Relations Committee on Aug. 19, 1919, as reported in the public press:

> Mr. Lodge: I want to ask, purely for information, is it intended that the United States shall receive any part of the reparations fund, which is in the hands of the Reparations Commission?
>
> The President: I left that question open.
>
> . . .
>
> Sen. McCumber: Did that mean we would claim nothing for the sinking of the Lusitania?
>
> The President: Oh no, that did not cover questions of that sort at all.
>
> The Chairman: I understood that pre-war claims were not covered by that reparation clause.
>
> The President: That is correct.
>
> Sen. Williams: This question of reparations does not in any way affect our rights to pre-war indemnities?
>
> The President: That is expressly stated.

Professor E. M. Borchard of Yale University said:

> Mr. Borchard: I say so far as our treaty position is concerned, we can stand up straight and say from a treaty position "Germany has no claims whatsoever: she has foreclosed her claims as a nation."
>
> Mr. Graham: Are you assuming the position that the Government of the United States committed an immoral act when it entered into the treaty of Berlin?
>
> Mr. Borchard: No sir, I say I think it gave us the privilege of doing such an act if we take advantage of it. We have not yet done that.
>
> Mr. Graham: That treaty specifies in distinct terms as I understand it, that the German Government, for instance, will take care of its own people. Is that immoral?
>
> Mr. Borchard: No sir. But when we remit people from whom we take property to a remedy that is valueless and known to be so, I can not regard the method as very moral.

(Hearings on H. R. 13496 Jan. 11, 1923, p. 202, House Judiciary Committee),

Charles H. Butler, testified before the same Committee (Hearings on H. R. 13496, Jan. 5, 1923, p. 107):

> In my opinion the attitude of this Government in holding on to this money as a question of security, is perfectly justifiable and proper under principles of International law and equity and justice and applicable treaties and legislation. The real question is a practical question as to how much of it should be held. I think the Government can afford to release a certain percentage of it.

Professor Charles C. Hyde of Harvard University in his text book on International Law (1922) Vol. 2, p. 239, says that the treaty provisions permitting the utilization of the property of German nationals for the payment of claims against the German Government are not confiscatory in character, because of the undertaking of Germany to reimburse its nationals. He argues however that they constitute "Practical confiscation by reason of the fiscal burden imposed upon the German territorial sovereign."

Mr. Louis Marshall of the New York Bar testified before the House Committee (Hearings on H. R. 13496 Jan. 10, 1923, p. 190) as follows:

> Mr. Denison: What would you think of it if Berlin were not insolvent?
>
> Mr. Marshall: Why if Berlin were not insolvent it would all depend upon whether or not that would involve long litigation and long delays before the persons who were entitled to their property got it.
>
> . . .
>
> Mr. Denison: We made a treaty with the German Government as a government, and that Government is the sovereign of these citizens whose property we have, and that Government has entered into an obligation, as any other Government enters into a treaty, by which they say they will pay these nationals for the property they claim.
>
> Mr. Marshall: They will pay them in marks at the rate of 10,000 marks for a dollar.
>
> Mr. Denison: Well, that is a mere incident. Suppose their money was good and they were not bankrupt. What would you think of that situation?
>
> Mr. Marshall: If their money was good, if they were not bankrupt, if they were ready at once to pay it over, and would not relegate us into the remote future, and if several other hypotheses were true . . . why then, perhaps it would not make much difference, so long as we got what belonged to us. We would not ask any questions. But that is not the situation. Germany is not good. Its money is not good.

Finally it will be interesting to consider the remarks of the Hon. W. H. King in the United States Senate on March 3, 1923 (Congressional Record, p. 5870). He said:

> It will be perceived that there are some important legal questions—and perhaps a foundation for some international complications—in the legislation before us (the proposal to return $45,000,000 to the Germans), or at least in the proposition to restore all the property to the German, Austrian and Hungarian Nationals who claim to be the owners of the same. Germany—a sovereign nation—and we dealt with her as a sovereign nation—declares in effect that the property of her nationals held by the United States has been expropriated by her and that she has undertaken to fully compensate her nationals for such property. Technically and legalistically can the United States assume that her act of expropriation is invalid? May the United States thus impugn the solemn declarations of the nation with whom it entered into a solemn treaty: and may our Government ignore the provisions of the treaty and deal with the property as though both the legal and equitable titles were still with the German nationals?
>
> Again, if that position shall be assumed by the United States and the property returned to German Nationals from whom it was taken, and the Mixed Claims Commission find that Germany is indebted to the various American citizens in amounts aggregating tens of millions of dollars, and Germany is required by the United States to satisfy the judgments of such commission, what would be the situation if Germany should refuse payment upon the ground that she had by the Treaty of Berlin placed in the hands of the United States property of the value of hundreds of millions of dollars which was to be held, if not for the purpose of being applied toward the liquidation of the claims of American citizens against Germany or her nationals, at least it was so to be held until such time as the German Government "shall have made suitable provisions for the satisfaction of all claims of all persons whomsoever who owe permanent allegiance to the United States and who have suffered loss, damage or injury by reason of the acts of the German Government, since July 31, 1914—" and the United States had, without her authority dissipated such property by delivering it to various persons in Germany.

It is therefore apparent that even those opposing the application of the funds in the hands of the Alien property Custodian to the payment of the American claims against Germany, have abandoned the argument that such appropriation would constitute confiscation of private property by the American Government, assuming there was an implied agreement not to confiscate.

The most that they are able to say is that the proposed procedure would have the same result as confiscation *if Germany fails to keep its promise (made in the Treaty) to its own citizens to compensate them for the property taken.* We are asked to prevent Germany from breaking its solemn word to compensate its citizens, by paying them ourselves, and then to rely on Germany to compensate our citizens for injuries done them in violation of treaties and International law, though all their assets are pledged to the Allied Governments.

In making this suggestion, they overlook intentionally or unintentionally the fact that Germany would have a right to take any property of its own citizens for public use by way of taxation without compensation, and it is quite clear that this right would extend at least to personal property in the United States. The total amount of property now in the hands of the Alien property Custodian is estimated to be worth $300,000,000. (Hearings H. R. 13496, p. 6), of which only $5,000,000 represents real estate. If the German owners are to maintain their claim that the United States Government proposes to violate an implied agreement made with them, by accepting their property for the payment of the American claims against Germany, they can not rely on the Prussian Treaties or on the implied agreement not to confiscate private property.

It will be necessary for them to prove that when they brought their property to the United States, the American Government agreed not only that it would never confiscate their property for its own uses, but also that if their own Government attempted to levy a tax on the property thus brought into the United States or to expropriate it for the public use by the exercise of the right of eminent domain, agreeing to

pay them compensation therefor, the United States had agreed to prevent their own Government from doing so.

An agreement of that kind would make the United States into a house of refuge for thieves, or at least for tax dodgers.

Of course no such agreement was ever made or thought of. Furthermore in the present case if the property is restored in the United States to German resident owners and they keep it here, as they would have a perfect right to do, the German Government, being still indebted to the United States, would have to collect the money to be used by it for the payment of the American claims out of the property of its citizens also resident in Germany, who were not far-seeing enough to take their property out of the country.

The whole proposition amounts to a suggestion that the United States agreed to assist any alien who brought property into the United States, in the dodging of lawful taxes or levies imposed by his country, and in evading any requisition or call upon such persons by their own Government.

VI. The Right of Germany to Expropriate the Property of Its Citizens in the United States

We can do no better in considering this question than to quote from the speech of Senator King on March 3, 1923. He said:

> I concede that the Treaty of Versailles followed by the Berlin Treaty raises issues that call for most serious consideration and present questions which compel a re-examination of what I have felt to be the moral and legal grounds calling for restitution of the property seized by our Government. . . . However, we should frankly examine the other side of this question, because, if it should be the right one, then our Government must take such steps as will prevent confusion or place it in a legally indefensible position . . . (p. 5869).

Senator King then stated that there was no doubt that Germany as a sovereign state could expropriate all or any part of the property of its nationals for the public good. He said that the right of eminent domain was inherent in all sovereignties and would exist without constitutional recognition; that the right of eminent domain antedated constitutions.

He then quoted from Article 7 and 153 of the German Constitution of August 11, 1919, from German jurists and said:

> I think it may be asserted without fear of successful contradiction that Germany both before, during and after the war, asserted the right to take the property of her subjects under the law of eminent domain; and her highest judicial tribunals affirmed that right. (p. 5869.)

He then stated that the United States has often exercised the right of eminent domain, and cited instances during the recent war of the taking of privately owned property.

He then referred to the taking by the United States, as victors, of the claims of American citizens against Spain after the Spanish-American war and referred to the agreement following the late war, between our country and France.

The learned Senator then used the following pertinent language.

> So, Mr. President, unless there are some conditions or circumstances which differentiate the case now before us from the broad principles of law with respect to the right of Governments to expropriate the property of their citizens, there may be sound reasons justifying the Secretary of State in opposing, as his communications to Mr. Winslow of the House, respecting this bill would indicate, the return to the nationals of Germany, Austria and Hungary of the greater part of the property now held by the Alien Property Custodian. It seems clear that if Germany had the right to expropriate property for war purposes that same right would exist when she was making peace with the victorious nations.
>
> It may be urged that the right of expropriation is lost by Germany with respect to property, particularly real property, beyond her borders. I express no opinion with respect to her right to take real estate under the power of eminent domain, which has been acquired by her nationals and is situate in other countries. I am inclined to think, however, that with respect to personal property, unless some treaty provides otherwise, or certain national acts and usages create a situation which would give rise to the doctrine of equitable estoppel, the right to expropriate personal property of German Nationals situate in other countries existed in Germany's behalf when the Versailles and Berlin Treaties were signed. . . .
>
> It follows, therefore, under the principles of law to which I have referred, that unless there is some exception in the case before us, growing out of treaties or some circumstances and conditions not, so far as I know, clearly or specifically defined, the personal property owned by alien enemies was subject to the right of eminent domain by the Government to which the owners of such property owed allegiance.
>
> If these premises are correct, then when the Versailles treaty was ratified by the German Government it constituted a taking of the personal property in the hands of the Alien Property Custodian which was owned by German Nationals; or if not an absolute expropriation of what might be called the corpus of the property, at least its use for an indefinite period. Technically speaking, however, the treaty was an asportation of the property, and such a taking as would amount to a conversion by the German Government which would entitle the owners thereof to compensation.

That the learned Senator was correct in his interpretation of German law, can not be doubted.

Arts. 7-153 of the present German Constitution, provide as follows:

> Art. 7. The Federal State has jurisdiction over . . . matters concerning expropriation.
>
> Art. 153. The Constitution guarantees the right of private property. Its nature and limitations are defined by law. Expropriation shall take place only for the common good and shall be subject to the due process of law. There shall be appropriate compensation, unless otherwise provided by Federal Law. . . . Property rights impose certain duties. The use of property shall serve for the common good.

The Supreme Court of the German Empire, in a case entitled "B. vs. Koncurs, decided on Oct. 8, 1918 said:

> Thus . . . the compensation in regard to all rights in property or in the use of the same shall take the place of the expropriated object . . . by virtue of a Federal law, the owner is to be compensated for the thing expropriated on account of public interest.

The same highest Court of Germany on November 13, 1914, in Fiscus vs. S. said:

> The law of expropriation is governed by the principle that the compensation due the owner is to be made in money. The owner cannot demand some other substitute for the money, especially not a substitute in kind.

German jurists, publicists and text writers have recognized this right and power as firmly established. See Pufendorf in his "De Jure Naturae et Gentium (Concerning the Laws of Nature and Peoples) (1632-1694). He said:

> The sovereign power, they say, was erected for the common security, and that always will give a prince a sufficient right and title to make use of the goods and fortunes of his subjects, whenever necessity requires.

and again:

> The state of a Commonwealth may often be such that either some pressing necessity will not give leave that every particular subject's quota should be collected, or else that the public may be forced to want the use of something in the possession of some private subject. It must be allowed that the Sovereign power may seize it to answer the necessities of the state. [See also Vattel's "Droit des Gens" (1714-1764).]

In 1913, George Peterzelt wrote a thesis entitled "The State's Rights of Expropriation." (Harvard

Law Library). Peterzelt in this thesis said among other things:

> By what right is the State authorized to expropriate its subject's property or at least exercise compulsion to relinquish their property? . . . The only correct explanation is this, which is also given by Bornhak in his Prussian Public Laws: It rests without doubt upon the theory of eminent domain, founded by Hugo Grotius and extended by his followers. Indeed it may be regarded as its continuation. Owing to its omnipotence, its plenary power, the State has the right to withdraw from its subjects, every private right which they may have with regard to other private persons, and it may keep it for itself or transfer it to other private persons. . . . Among the objects of expropriation enumerated in the debates prior to the passage of the law were the following: Cases of public distress, especially in the case of danger by fire or water, earthquakes and land slides, *in distress of war* and other urgent need.

Thus it will be seen by the Constitution, Courts and text writers of Germany, the law of expropriation has been recognized for three hundred years.

The general rule that all personal property follows the person of the owner as determined by the English High Court of Chancery in Penn vs. Lord Baltimore, in 1750, is too well settled to require any citation of the authorities and practically all of the property held by the Alien Property Custodian is personal property. (See also 32 Cyc. p. 675; Tappan v. Merchants Natl. Bank. 19 Wall 490).

In a statement submitted to the House Committee on Interstate Commerce as of November 29, 1922, the Alien Property Custodian gave the total value of the property on hand as $347,310,776.22. Of this amount $5,018,499.72 was said to be real estate, the balance personal property. (Hearing on H. R. 13496, p. 6).

He also gave a list of 126 enemy vessels seized by the Government, and now in his possession carried on the books at $34,000,000.

So it is apparent that Germany would have had the right to expropriate its citizens' private personal property in this country, even if it had never been seized by the United States Alien Property Custodian, and by the comity of nations, our Courts would have lent their aid to the enforcement of this right.

There has never been any contrary rule of law or treaty.

We are now holding and conserving the German expropriated property for the benefit of and at the request of Germany.

VII. International Precedents

In Vol. 2 of Charles H. Butler's Work on "The Treaty Making Power of the United States," the author said (p. 293):

> Notwithstanding the fact that these claims are property rights, in numerous instances claims of citizens have been absolutely destroyed so far as they existed against the Foreign Governments, by the action of the Executive in making a treaty and of the Senate in ratifying it. In such cases no further action of Congress appears to be necessary so far as the complete extinguishment of the claim against the other Government is concerned.

In Hon. John Bassett Moore's "History of International Arbitrations," more than fifty instances are cited in which the United States has entered into treaties providing for the disposition of claims of our citizens against such Governments, or the claims of their citizens against the United States. Thus in the first treaty between the United States and France, made on July 31, 1801, it appeared that France had claims against our Government and certain citizens of the United States had claims against France. The treaty provided that the claims of the citizens of the United States should be set off against the claims which the French Government had against the United States. The United States by this treaty used the claims of American citizens against France, amounting to many millions of dollars to settle the just claims of France against the United States.

By the Treaty of Washington in 1871 between the United States and Great Britain, a similar arrangement was made relative to the claims of American citizens against Great Britain, growing out of damages caused to American commerce by the depredations of the Confederate cruisers Alabama and Florida which had either been built or sheltered in the harbors of Great Britain, during the war.

A similar arrangement was made in the Treaty between the United States and Spain at the close of the Spanish-American War.

In that case, citizens of Spain had many claims against the United States for property commandeered and destroyed. By Article 7 of the treaty, the United States relinquished all claims for indemnity against Spain and the Treaty provided:

> The United States will adjudicate and settle the claims of its citizens against Spain, relinquished in this article.

This paragraph is precisely similar to Art. 297 (1) of the Versailles Treaty, whereby Germany agreed to compensate its citizens for the loss of their claims against the United States and other countries.

Finally, it appears that during the late war, certain citizens of France presented numerous claims for property damages, arising out of the alleged actions of the members of the American Expeditionary Forces. The validity and amount of these claims of individual citizens of France was duly recognized by this Government. The Government of the United States, however, had a large claim against the French Government for war materiel sold to it subsequent to the armistice. An agreement was therefore entered into whereby France agreed to relinquish all claims of its citizens against the United States in consideration of the cancellation of admitted debts in an equal amount due by the French Government to the United States Government.

It must be presumed that the French Government will compensate its own Nationals.

Sufficient seems to have been said to prove beyond peradventure that the provisions of the Berlin and Versailles Treaties whereby Germany appropriated the contingent[1] claims . . . of its citizens against the United States for the return of their property to its Governmental debts, was an agreement which it had an absolute legal right as a sovereign government to make in accordance with international precedents as old as the United States.

VIII. The Lusitania Case

In the opinion of Judge Mayer, dated August 23, 1918 (Petition of Cunard Steamship Company Ltd. 251 Fed. Rep. p. 715) the Court said:

> While in this lawsuit, there may be no recovery *it is not to be doubted that that United States of America and her allies will well remember the rights of those affected by the sinking of the Lusitania, and, when the time shall come, will see to it that reparation shall be made for one of the most indefensible acts of modern times.*

After showing that the application of the private property of German Nationals to the payment of indemnity claims of the United States against Germany is proper and right from every standpoint, moral and

1. Contingent upon the decision of Congress to follow our traditional policy, and not to confiscate the private property of enemy aliens, found in this country at the outbreak of war. We have the legal right to confiscate the property, and in addition, to compel the payment of full damages by Germany.

legal, the question remains what action will be taken by Congress?

No one can doubt that there would be no hesitation in Congress, if it were not for the repeated and vicious representations made on this subject by German propagandists.

As we have seen the United States never confiscated any property and never intended to do so, and has no such intention at the present time, and yet, we constantly hear statements, to the effect that the treaty provisions will not be carried out, because it would amount to confiscation of private property of German Nationals.

The best answer to this argument is contained in a part of the letter addressed to the German Commissioners, etc., under date of June 16, 1919, in answer to a protest, a little less than two weeks prior to the signing of the Versailles Treaty, in which the following explanation of these provisions was made:

> As regards the first objection they would call attention to the clear acknowledgments by Germany of a pecuniary obligation to the Allied and Associated Powers, and to the further circumstances that the immediate resources of Germany are not adequate to meet that obligation. It is the clear duty of Germany to meet the admitted obligation as fully and as promptly as possible and to that end to make use of all available means. The foreign investments of German Nationals constitute a class of assets which are readily available. To these investments, the treaty simply requires Germany to make prompt resort. . . .
>
> **Treatment of Private Property**
>
> The method of using this property laid down by the treaty can not be considered either in principle or in the method of its application as a measure of confiscation. Private German interests will only be injured by the measures contemplated so far as Germany may decide that they shall be, since all the proceeds of Germany's property will be carried to the credit of Germany, who is required to compensate her own nationals, and will go to reduce her debt to the Allied and Associated Powers.

This reply was evidently accepted, for the treaty was signed with the provisions we have heretofore referred to unchanged and so ratified by the German Reichstag at Weimar.

There are no legal or moral grounds for refusing to apply this property to the payment of our just claims and the German Government makes no complaint, but the entire matter boils down to a plea by the propagandists that the German citizens be paid in full for the property taken in the United States, and applied by their Government to our claims, and that American citizens be relegated to a claim to be paid at some very distant date by the German Government. If the German Government which is the sovereign of these pleaders were an honorable government which was accustomed to keep its words, nothing would ever have been heard of this plea. It is based on German citizens' dis-belief in the solemn word of their own Government and on their willingness to allow Americans to rely thereon, if they can be persuaded to do so. And they constantly attempt to confuse the Acts of Germany and the United States to make our actions appear to be dishonorable.

One further specious suggestion is constantly presented, viz: that the German Government will be insolvent after it has made final arrangements for the satisfaction of its debts. No one acquainted with the facts relative to international matters today, believes or can be made to believe any such thing, for it is well known that the actual physical assets of Germany today are far in excess of what they were before the war, and if that country were willing to attempt to satisfy the lawful claims against it, it could do so at once, and there is no doubt that it will satisfy the claims of its own citizens in the event that Congress fails to be deceived by the confiscation myth and uses this property for payment of American claims as Germany has agreed it may do. But there can be no doubt that the German Government would be very glad to have Congress give this money away, and in that event, American claims would be satisfied as soon as Germans really believe that a crime was committed when the Imperial German Government sank the Lusitania, if that day should ever arrive. Germany will not pay twice.

We will never confiscate private property; tho International Law and Treaties permit us to do so, but we may take German property expropriated by the German Government, to pay just American claims, where we have the solemn word of the German Government to indemnify its citizens in full for any loss they may suffer thereby. To act otherwise would indeed be "maudlin sentimentality."

The Rhine Claims

Every one admits that the ideal solution of the difficulties would be to have Germany pay our claims direct, a possibility which was contemplated in the Berlin Treaty and Knox Resolution.

We would then be required to turn over the property pledged to us, now in the hands of the Alien Property Custodian, to Germany for such disposition as it might wish to make thereof, or else to return it to its former owners at Germany's request and direction.

We have said that this is the ideal solution from the American standpoint, *but it can never be accomplished,* because it would amount to depriving the Allied Governments of $300,000,000 which they are entitled to, under the Versailles Treaty, and to this they will never give their consent.

It is true that the Allies have agreed to pay the costs of the American Army of Occupation out of reparations collected by them from Germany and have not included in the agreement any mention of the American claims against Germany, but in an official communiqué issued in Paris on May 24, 1923, the Allied Governments said:

> The committee occupied with the reimbursement of the cost of the American Army of Occupation will meet tomorrow afternoon. Negotiations have been going on between the Governments in the last few days, with the result that the Allies do not maintain in the with the result that the Allies do not maintain *in the text of the agreement the reservation which irritated the United States and which provided for a case in which Germany might pay reparations directly to America.* The Allies consider that they are sufficiently able to protect their rights in such a case by the text of the Treaties without it being necessary to introduce a reservation in the agreement.

The meaning of this communiqué is clear.

Congress may, if it so desires, abandon its right to apply the German property to American claims and return it to its pre-war owners, with or without Germany's consent, but if it does so, the Allied Governments will never permit Germany to pay our claims directly out of assets pledged to them, and the ultimate result will be that the American Government and its citizens will either get nothing, or the claims will have to be paid out of the Treasury of the United States. Nor will the Allies permit assets pledged to them to be released to secure a German loan in America.

Thus we see that the claim for the expenses of the Army of Occupation, and the indemnity claims against Germany are inextricably interwoven.

(Continued on page 528)

FINAL PROGRAM FOR MINNEAPOLIS MEETING

Programs of Various Sections Show Important Questions to Be Discussed by Subordinate Bodies—Legal Education and Public Utility Valuation Among Problems to Be Considered —U. S. Supreme Court Judges to Be Guests at Judicial Section Dinner—National Association of Attorneys-General to Hear Interesting Addresses—Beauty Spots Around Minneapolis—Some Changes in Association Program

WE PRINT in this issue the final program for the annual meeting, including the programs for various sections of the Association. A glance at the latter will give new members an idea of the multifold activities, in addition to the regular sessions of the main body, which mark these annual gatherings. The papers and discussions in these subordinate bodies are always of particular importance to those interested in special fields and are frequently of wide general interest. The work of these sections brings a large part of the grist to the mill of the main body. "Education and the Law," "Public Service Company Valuations," "The Human Element in the Administration of Justice," are among the papers which are scheduled to be read. The program for the Conference of Bar Association Delegates, also a section, has already been printed. It is announced that Chief Justice Taft is expected to be present at its meeting.

The National Association of Attorneys-General holds its meeting at the same time as the American Bar Association, and its program, which is also printed in this issue, is particularly full and suggestive.

The illustrations give an idea of the beauty spots around Minneapolis which visitors to the annual meeting will have an opportunity to enjoy. They are typical and were selected from a large number of photographs which were furnished the JOURNAL by the courtesy of the local committee in charge of arrangements. Few cities have such a wealth of natural beauty right at hand as the one which will this year be the host of the Association.

A careful examination of this final program is suggested, as there are some additional details about the special trip via the Great Lakes, special trains from Chicago to Minneapolis, and the entertainment features in that city.

Special invitations to the Tea and Reception at the Art Institute from 4 to 6 P. M. on Thursday, will be sent to all ladies accompanying members of the Association to the Minneapolis meeting upon their arrival in Minneapolis, so far as their names and addresses can be obtained. In order that none may be omitted the Committee will appreciate it if each member will write Mr. John Junell, Secretary of the Committee, 630 First National Bank Building, Minneapolis, giving the names and hotel or other Minneapolis address of any ladies accompanying him to this meeting.

Final Program

Wednesday morning, August 29, at 10 o'clock.

President John W. Davis of New York will preside.

Address of Welcome by Hon. J. A. O. Preus, Governor of Minnesota.

Announcements.

Report of Secretary.

Report of Treasurer.

Report of Executive Committee.

Nomination and election of members.

Address by the President of the Association.

Meeting of State delegations for nomination of General Council and Vice-President and Local Council for each State.

Wednesday afternoon, August 29, at 2:30 o'clock.

This will be a joint session of the American Bar Association and the Minnesota Bar Association.

William A. Lancaster, President of the Minnesota State Bar Association, will preside.

Address by Hon. Pierce Butler, Associate Justice of the U. S. Supreme Court.

Wednesday evening, August 29, at 8:00 o'clock.

Address by The Right Honorable The Earl of Birkenhead.

Address by Dr. E. S. Zeballos, former Minister of Foreign Affairs of Argentina.

Election of General Council.

9:45 P. M. President's Reception at Leamington Hotel.

Thursday morning, August 30, at 10:00 o'clock.

Reports of Sections and Committees. The names of Chairmen are given below.

SECTIONS

10:00 a. m. Criminal Law, Floyd E. Thompson.
10:05 a. m. Comparative Law, Robert P. Shick.
10:10 a. m. Judicial Section, John P. Briscoe.
10:20 a. m. Legal Education, Silas H. Strawn.
10:30 a. m. Patent, Trade-Mark and Copyright Law, Charles E. Brock.
10:40 a. m. Public Utility Law. John B. Sanborn.
10:50 a. m. National Conference of Commissioners on Uniform State Laws, Nathan William MacChesney.
11:00 a. m. Conference of Bar Association Delegates, Charles A. Boston.

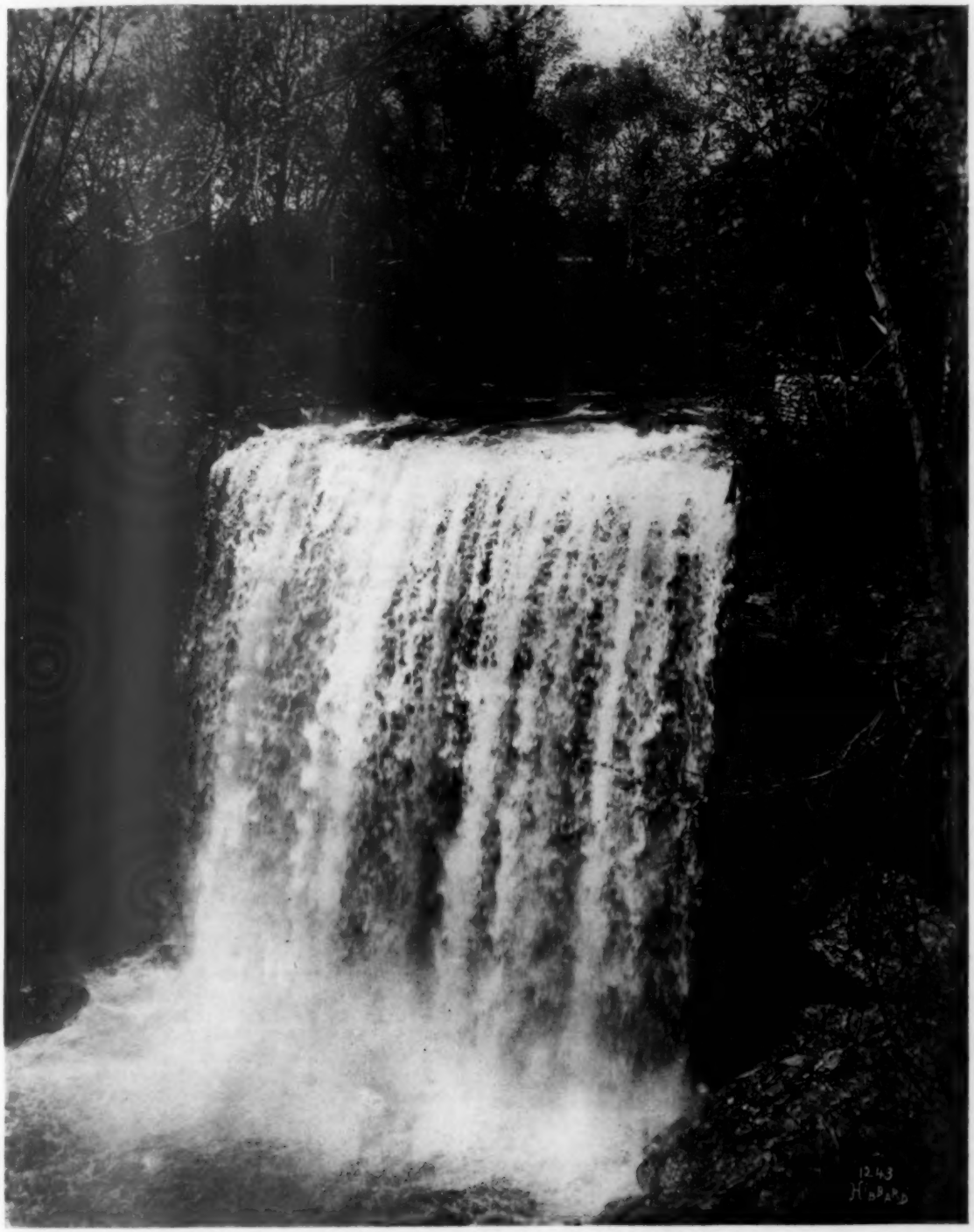
COMMITTEES

11:10 a. m. Professional Ethics and Grievances, Thomas Francis Howe.
11:20 a. m. Commerce, Trade and Commercial Law, W. H. H. Piatt.
11:40 a. m. International Law, George W. Wickersham.
12:00 noon. Insurance Law, James C. Jones.
12:10 p. m. Publicity, Frederick A. Brown.
12:20 p. m. Memorials, W. Thomas Kemp.
12:25 p. m. Membership, Frederick E. Wadhams.
12:35 p. m. Jurisprudence and Law Reform, Everett P. Wheeler.
1:00 p. m. Adjournment.

Thursday afternoon, August 30, at 2:00 o'clock

Special Committee Reports as follows:

2:00 p. m. American Citizenship, R. E. L. Saner, Chairman.
2:30 p. m. Law Enforcement, Charles S. Whitman, Chairman.



MINNEHAHA FALLS—A BEAUTY SPOT NEAR MINNEAPOLIS

3:00 p. m. Judicial Ethics, Chief Justice Taft, Chairman.

Discussion.

Thursday evening, August 30, at 8:00 o'clock.

Address by Hon. Charles Evans Hughes, Secretary of State.

Friday morning, August 31, at 10:00 o'clock.

Statement from Council of American Law Institute by William Draper Lewis, Director.

Reports of Committees (Continued). The names of chairman are given below.

10:30 a. m. Classification and Restatement of Law, Thomas I. Parkinson.

10:40 a. m. Admiralty and Maritime Law, Charles C. Burlingham.

10:50 a. m. Noteworthy Changes in Statute Law, Joseph P. Chamberlain.
11:00 a. m. Uniform Judicial Procedure, Thomas Wall Shelton.
11:10 a. m. Change of Date of Presidential Inauguration, Wm. L. Putnam.
11:20 a. m. Legal Aid Work, Reginald Heber Smith.
11:30 a. m. Law of Aeronautics, Wm. P. MacCracken, Jr.
11:45 a. m. Federal Taxation, Charles Henry Butler.
Address by William S. Moorhead, Chairman of Tax Simplification Board, Washington, D. C.
12:00 noon. Nomination and Election of Officers.
Miscellaneous Business.
Adjournment *sine die*.

Friday afternoon, August 31, at 2:00 o'clock.

On Friday afternoon, August 31, there will be an automobile ride for members and their families around Minneapolis and suburbs. Starting from the several hotels at 2 P. M. the cars will pass through a portion of the business section of the city, crossing the Mississippi River at the Third Avenue bridge, then through the grounds of the Minnesota State University, and by the River Boulevard to Minnehaha Falls; thence by Minnehaha Boulevard to Lakes Harriett and Calhoun and the Minikahda Club, where a short stop will be made. Returning to the city the route will be by Dean Boulevard and around Lakes of the Isles. Complimentary tickets for the ride may be obtained at the treasurer's office prior to noon on Friday, August 31st.

Friday evening, August 31, at 7:00 o'clock.

Annual Dinner of Association.
Dinner to Ladies.

Saturday, September 1.

On Saturday, September 1, an all-day excursion has been arranged. Special trolley cars will leave Sixth Street and Hennepin Avenue at 10:05 A. M. and 11:25 A. M. for Excelsior where steamers will be taken for an hour's ride on Lake Minnetonka. Luncheon will be served at Radisson Inn on Christmas Lake, followed by a musical entertainment. Guests will return to Minneapolis by special cars at 4 P. M. or can return earlier by regular trolley service. Complimentary tickets for this excursion may be obtained at the treasurer's office prior to Friday noon, August 31. No tickets will be issued to residents of Minneapolis or St. Paul until after guests from outside the Twin Cities have been supplied.

Meetings of Association and Other Bodies

(a) Headquarters of the Association will be established at the Hotel Radisson. The Secretary's and Treasurer's offices will be located in Assembly Room A on the mezzanine floor.

(b) All sessions of the Association will be held in the Auditorium at the corner of Nicollet Avenue and Eleventh Street, about four squares from the headquarters hotel. The President's reception on Wednesday evening, August 29, will be given at the Leamington Hotel.

(c) The annual dinner of the Association will be held in the Auditorium at St. Paul on Friday evening, August 31st.

(d) The meetings of the General Council of the Association will be held in the Empire Room of the Radisson Hotel.

(e) The Conference of Commissioners on Uniform State Laws will hold its sessions in Assembly Room B of the Radisson Hotel, commencing Tuesday, August 21st. (For detailed program of the Conference of Commissioners see p. 441 of the July JOURNAL.)

(f) The Conference of Bar Association Delegates will meet in Assembly Room B of the Radisson Hotel on Tuesday, August 28th. There will be three sessions of the Conference on that day. (For detailed program of the Conference of Delegates see pp. 375-6 of the June JOURNAL.)

Comparative Law Bureau

The session will be held in Empire Room, Radisson Hotel, Wednesday afternoon, August 29th, at 2:30 o'clock. It will be open to the public. The Council will meet at 2 p. m. same day in Empire Room, Radisson Hotel.

Phanor J. Eder, Member of Council of Section, will preside.

The order of business will be as follows:

Statement of the Chairman as to organization of the Section.

Treasurer's Report.

Address of Borris M. Komar, Editor of the Journal of Conational Law.

Election of Officers and Council.

New Business.

Judicial Section

The Judicial Section of the American Bar Association will hold two sessions, both on Tuesday, August 28th.

The First Session will be held at 2:30 p. m. on Tuesday, August 28th, in the Empire Room of the Radisson Hotel. Judge John P. Briscoe, of the Maryland Court of Appeals, Chairman of the Section, will preside.

Hon. Calvin L. Brown, Chief Justice of the Supreme Court of Minnesota, will deliver the Welcome Address.

A paper will be read at this session by Hon. Martin J. Wade, U. S. District Judge, Southern District of Iowa, subject, "The Great American Jury."

Hon. Carrington T. Marshall, Chief Judge of the Supreme Court of Ohio, will read a paper entitled "Education and the Law." Hon. Walter C. Owen, Associate Justice of the Supreme Court of Wisconsin, will also read a paper, the subject to be announced hereafter. Routine business will be transacted at this meeting.

At 7 p. m. Tuesday, August 28th, the annual dinner of the Judicial Section will be held at the Minneapolis Club.

Hon. Wm. Howard Taft, Chief Justice of the United States, and Hon. Pierce Butler and Hon. Edward T. Sanford, Associate Justices of the Supreme Court, will be among the distinguished guests of the Judicial Section, at the dinner.

(Tickets for Dinner may be obtained at the office of the Secretary of the Association, Assembly Room A, Radisson Hotel.)

Section of Patent, Trade-Mark and Copyright Law

The session will be held in Court Room No. 2, on Tuesday, August 28th, at 10 a. m.

(Continued on Page 529)

CAMBRIDGE CONFERENCE OF AMERICAN LAW INSTITUTE

Certain Questions Regarding Form of Restatement Discussed and Determined—Preliminary Discussion of Matters to Be Included in Report of Committee to Prepare Survey of Defects in Criminal Justice—Fact-Finding Problems Considered

By William Draper Lewis
Director American Law Institute

AT THE meeting of the Council, held on May 19, 1923, arrangements were made to hold, in Cambridge, Massachusetts, on June 25-26-27, a conference, at which should be present the Director, the reporters, as many members of the Council as found it possible to attend, and also a few persons whose advice was sought on one or more of the matters to be discussed.

The principal object of the Conference was to determine such questions in regard to the form of the restatement as should be determined before much work had been done on any one topic. There were also special questions in respect to the work on the Conflict of Laws and Contracts, which the reporters for these subjects desired to discuss with groups of specially invited persons. The Committee which has been charged with the responsibility of preparing for the Council a Survey and Statement on the Defects in Criminal Justice desired to have the advantage of a preliminary discussion of the matters to be dealt with in their report.

Those present were: George W. Wickersham, President; William Draper Lewis, Director; George E. Alter, Henry M. Bates, Honorable Alexander C. King, Victor Morawetz, George Welwood Murray, Honorable Arthur P. Rugg, Members of the Council; Samuel Williston, Reporter for Contracts; Arthur L. Corbin and William H. Page, specially invited for advice on Contracts; Joseph H. Beale, Reporter for Conflict of Laws; Calvert Magruder, Legal Assistant in Contracts; Austin Scott, Legal Assistant in Contracts; John G. Buchanan, Herbert F. Goodrich and Ernest G. Lorenzen, specially invited for advice on Conflict of Laws; Francis H. Bohlen, Reporter for Torts; Herbert S. Hadley, Chairman of Committee on Survey and Statement of Defects in Criminal Justice; William E. Mikell[1], member of Committee on Survey and Statement of Defects in Criminal Justice; J. Weston Allen, Edwin R. Keedy, and James Bronson Reynolds, specially invited for advice on Survey and Statement of Defects in Criminal Justice; Herman Oliphant[2], Edmund M. Morgan and Karl N. Llewellyn, specially invited to discuss ways of securing facts bearing on the practical operation of legal principles; Shippen Lewis, specially invited for advice on form of restatement.

The Conference met in Dane Hall, of the Harvard Law School. Morning and afternoon sessions were held, and on Tuesday, the twenty-sixth, there was also an evening session. The members lunched and dined together at the Colonial and Oakley Clubs.

The first day was devoted to a discussion of the details pertaining to the form of the restatement. The members had before them three forms prepared by Mr. Beale of a portion of the sub-topic Domicile in Conflict of Laws, as well as a form prepared by the Director; and also two forms of a portion of the sub-topic Consideration in Contracts, prepared by Mr. Williston. These forms varied from that of a well written, concise treatise to that of a carefully drawn statute, with illustrations and notes. Although at first, quite marked differences of opinion existed among those present, as the discussion continued, a general consensus of opinion was reached on the more important matters raised by the various forms under examination. The reporters and the Director, being appointed a Committee to express the results of the discussion, on Tuesday morning, the 26th, made a report, in which they recommended certain tentative rules of form, which were unanimously adopted by the Conference.

TENTATIVE RULES OF FORM SUGGESTED BY THE DIRECTOR AND REPORTERS

Rule I. The publications of the Institute on a topic shall consist of the following parts: (a) The Restatement; (b) The accompanying Treatise. These parts shall be separately printed.

Rule II. The Restatement shall consist of: (a) Principles stated with such fullness as will afford an adequate presentation of the subject, and (b) Such amplification, illustration, and explanation as shall be necessary for the complete understanding and practical application of the principles. For the present, each reporter shall make such arrangement and distribution of this matter as he desires.

Rule III. The Treatise shall consist of a complete statement of the present condition of the law and a full citation of authorities. It shall analyze and discuss all the legal problems presented, and shall in the fullest sense justify the statements of the law set forth in the Principles.

This action shows the matters pertaining to the form of restatement on which the Conference was agreed, and also those matters of form which have been left for subsequent determination. Of course, such a Conference as was held in Cambridge can only make recommendations; the form as well as the substance of all publications of the Institute having under the by-laws to be passed upon first by the Council, and then by a meeting of members. The rules above set forth, however, will guide the reporters and others engaged in the work as long as they are not modified by the Council. With this reservation, the things definitely settled by the Conference are:

(1) The Restatement will be separate from the Treatise.

(2) The Principles will set forth the law with much greater fullness than would be the case if they

[1] Dean Mikell was also specially invited for advice on Conflict of Laws.

[2] Mr. Oliphant was also specially invited for advice on Contracts.

were merely a collection of "general principles" over which at present little or no differences of opinion exist.

(3) The law, as set forth in the Restatement, will be capable of being understood and applied without the necessity of referring to the Treatise, the principles being accompanied by illustrations and explanations.

(4) The Treatise will be complete from three points of view: (a) The citation of authorities; (b) The presentation of the present certainties, uncertainties, and confusions in the law; (c) The justification of the principles set forth in the Restatement.

If these rules are carried out, from a reading of the Restatement, the law as set forth in the principles can be thoroughly understood and consistently applied, but it will be only by reading the Treatise that the certainties, uncertainties, and confusions arising from the recorded decisions can be ascertained.

It will be noted that Rule II (b) states that for the present, each reporter shall make such arrangement and distribution of the illustrations and explanation of the principles in the Restatement as he desires. In some of the forms presented, the principles, while clearly stated were not separated from all of the explanatory matter; in others, the explanatory matter appeared in the form of annotations, or notes. While nearly all of those present expressed individual preferences for one or other of the forms, it was felt that the question presented would be more intelligently discussed and decided after each of those engaged on the work had had the opportunity to complete a definite portion of his topic. During the summer, while each reporter will set forth the principles of the part of the topic on which he is engaged in such manner as will enable them to be clearly perceived and separately discussed, in each case, the arrangement of the principles and explanatory matter as a whole, will be the one which appeals to the reporter. At a conference which will probably take place in the early fall, this remaining important question of form will be again the subject of careful examination and discussion.

Though to many these details of form may seem of minor importance, no one who has ever attempted to set forth the law clearly, will fail to recognize that questions of form, such as were discussed at this Cambridge Conference, are vital questions. It was generally recognized by those attending the Conference that the form adopted for the publications of the Institute would profoundly affect the ability to make practical use of the Restatement. Furthermore, it was also recognized that the form in which the Institute set forth the law would inevitably have an effect on those engaged in the work, and that, therefore, it is a matter of the very greatest importance to agree on a form which will tend to promote thorough research, and also care and accuracy in the use of language.

On the second day, after hearing a statement from Francis H. Bohlen, the Reporter for Torts, dealing with the method of approach, which he proposed to adopt in his work on that topic, the Conference entered into a discussion of matters pertaining to the Survey and Statement of the Defects in Criminal Justice. The Chairman, Mr. Hadley, submitted the following suggested outline of these defects:

1. Ineffective police methods, including registration, identification and apprehension of criminals, and the securing and preserving of evidence.
2. Ineffective systems and practices of examining magistrates and prosecutors in developing and preserving evidences, exacting bonds, conducting preliminary hearings or other investigations preliminary to trial.
3. Mistaken theories and methods of punishments and of pardons and paroles by executives and judges.
4. Faults and weaknesses of police, examining magistrates, prosecutors, judges, and those empowered to grant pardons and paroles, in the performance of their official duties.

(To this list can also be added the attorneys for the defendants in criminal courts whose disregard for the ordinary standards of professional ethics in the defense of criminals constitutes an important cause for the ineffective enforcement of the law.)

5. Inadequate number of courts and judges; inefficient system of organizing courts for holding prompt and effective preliminary hearings of criminal charges and for the trial of criminal cases.

In inviting discussion, he said:

> The principal purpose of this investigation and report is to enable the Council to decide whether it is advisable and practicable to undertake a restatement of the law of Crimes and Criminal Procedure. To reach such a decision it is necessary to determine to what extent there exists indefiniteness and confusion in the law of crimes and criminal procedure; to what extent they are not adapted to the present needs of life; and to what extent these conditions, if found to exist, prevent an effective enforcement of the criminal law. The further decision would then have to be made as to how much good could reasonably be expected to result from a clarification and restatement of the law of crimes and criminal procedure.
>
> It therefore becomes necessary to consider what other influence and conditions prevent a proper administration of criminal justice. The report as to these conditions and influences will also fix responsibility and make it possible for the public to understand the situation and to make (or at least endeavor to make) the necessary corrections. Such an analysis of the situation will also prevent unwarranted expectations as to results reasonably to be expected in case the Council should decide to proceed with the work of restatement.

In the discussion that followed, those present gave their opinion as to the relative importance of the different defects indicated in the Chairman's statement, and several suggestions were made in respect to the possible additional defects. At the conclusion of the discussion, the Conference recommended the Committee, in preparing its report, to follow the outline suggested in the light of the further suggestions made in the course of the discussion.

The third day of the Conference was devoted to the discussion of the ways in which the reporters and others working on a restatement of the law of a topic may secure facts bearing on the practical effect of an actual or proposed principle of law. Professors Oliphant, of Columbia, and Morgan and Llewellyn, of Yale, presented different aspects of this important subject. Mr. Oliphant pointed out that in choosing between an existing conflict in decisions, the correct decision would often depend upon which of the conflicting principles worked best, and that under modern conditions, often the rule which worked the best could not be ascertained except by careful investigation.

Mr. Morgan detailed the work which is being done under the direction of the Commonwealth Fund in ascertaining the practical results of certain reforms in the law of Evidence, which have been adopted in Connecticut and Massachusetts, and methods employed by the Committee, of which he is Chairman.

Mr. Llewellyn gave a number of examples of existing conflicts and uncertainties in the law relating to commercial subjects, indicating those on which he thought it would not be difficult to make investigations which would show the principle or rule of law which should be adopted.

At the conclusion of these addresses, a general discussion of the subject took place. All present rec-

ognized the value to those working on the restatement of the utilization of existing fact-finding agencies, or the creation of other machinery for ascertaining (where it was needful to do so) the practical operation of existing principles of law. It was, therefore, agreed that the subject and the problems involved should be given serious consideration, with a view of determining the nature of the information desired, and how far it was practically possible to obtain it. The Conference was not however in a position to make any definite recommendation. They, therefore, unanimously adopted the following resolution:

> The Conference recommends the Executive Committee and the council to consider the advisability, either through original research under its own direction, or by availing itself of the resources of established and reliable fact-finding institutions, or in any other manner of placing the Institute in the position to know the effect of the practical operation of the principles of law adopted by the Institute.

During the Conference, there were round table discussions among the group specially interested in Contracts, and the group especially interested in Conflict of Laws, as well as meeting of three committees of the Council—the Committee on Amendments to the By-Laws; the Committee on Membership in the Institute; and the Committee on New Members of the Council.

STUDY OF THE OPERATION OF RULES OF LAW

Whether a Given General Principle Should Be Applied to a Present Case at All Novel Involves Consideration of Whether It Will Work Well and This Can Only Be Determined by Scientific Examination of the Facts of Human Activities

By HERMAN OLIPHANT

THE American Law Institute, undertaking to restate the law, is beginning to consider the problem of finding ways for securing data bearing on the practical effects of rules of law. This discussion is a result of a general recognition of the fact that there can be no mere restatement of the law. The Institute will have to formulate much new law. The cases are in conflict as to hosts of questions. New law will be formulated for those jurisdictions whose decisions on such questions are not followed. Again, the authorities on a given question may be found to be substantially unanimous, yet the results reached by them will often be thought so undesirable on grounds of logical consistency or of practical convenience that the Institute will feel bound in its restatement of the law to recommend a different rule, thus again formulating new law.

Whenever the Institute is confronted by the necessity of creating, rather than merely reflecting law, as it will be when choosing between competing rules, there will be apparently two possible guides to a choice. A known general rule or principle may be applied or the question may be decided on grounds of practical convenience. But a general rule or principle is little more, if anything, than a convenient summary of the fairly uniform answers returned in the past to numerous and similar individual questions as to the affairs of life, each of such answers having been arrived at on grounds of practical convenience. As a matter of ultimate analysis, therefore, there is but one final guide to a choice between competing rules of law. Whether a given general rule or principle summarizes past decisions in a helpful manner can be accurately settled by doing nothing more than examine the decisions, but it cannot be correctly determined whether a general rule or principle should be applied to a present case, at all novel, without considering also whether the proposed rule or principle will work well. To do that means to go out and examine the facts as to the human activities which the rule, if applied, will affect.

There is not space for more than one example of what I mean. In the law of Contracts there is great uncertainty as to how definitive in its terms a promise must be to make a contract. Suppose a manufacturer of automobiles merely promises a seller of tires that he will buy from him all of the tires which he may require during the coming year at a named price, the seller in turn promising in the same terms to sell. The quantity is thus left uncertain. Now suppose the cost of rubber goes up, and, as sometimes happens, the seller declines to deliver the tires promised, claiming no contract binding him to do so on the ground that the buyer furnished no consideration for the promise to sell because the buyer might have required no tires at all, and therefore, did not obligate himself to do anything. Is the seller bound to deliver?

How shall this question be decided? If we begin by looking about for a general rule to apply, we shall find two competing for application and each doing nothing more than suggesting useful analogies. There are cases passing upon a whole range of such transactions which vary in the degree of the certainty of the promises involved. These promises can be arranged in a gradation made up of promises quite definite at one extreme and those wholly illusory at the other. One of the competing general rules summarizes the results reached as to the upper or more definite promises where there were held to be contracts. The other general rule summarizes the lower range of cases holding no contracts to have been made. At the middle of the range are the new and unsettled cases, where our case falls. Now there is nothing about either of these two general rules to coerce its application. Either could be applied to our case with no great straining. The decisive factor is the degree of certainty. That is a category of convenience. It requires no argument to show that how each rule would work in practice should be considered in deciding which to apply. I want to get on to discuss methods of deciding how rules of law work.

So far, students of the law, including judges, lawyers and teachers, have not had the resources necessary to do much more than to consider without investigation, and only in a general way, how rules of law work and thereby as best they could to arrive at conclusions. Such conclusions, of necessity, have been

based upon nothing more scientific than common sense. The result of the use of this common sense method on questions like this automobile tire case has been to place in the opinions of courts numerous and diverse views of the most general sort as to the practical aspects of the rules in question. There is a very great conflict of notions on this matter. Now suppose a different method were attempted. Suppose we should state the problem thus: Is an arrangement in which little more than the price has been fixed nevertheless a helpful device in getting the world's work done as such an arrangement is actually used in business? Is this a device whose utility should, therefore, be increased by giving it the sanction of legal enforcibility? Then suppose we went out to learn exactly how modern manufacturing businesses are conducted. We might find, for instance, that manufacturers today typically are forced to determine at the beginning of each production season the quantity of goods to produce during that season. Quantity of production is fixed by quantity of sales which in turn largely depends upon the price at which the goods can be sold if ordinary marketing conditions prevail. To know selling price in advance, the costs of raw materials and supplies must be known in advance. If such were found to be the facts, an arrangement whereby a producer of goods could settle the cost of materials before committing himself as to quantity would be a highly useful device from his standpoint. On the other hand, the seller's superior knowledge of the raw materials market or his superior resources may specially fit him to assume this price risk, this shift of risk to a specialized risk taker being a desirable bit of division of labor resulting in the risk being carried at a less social cost. It is no answer to say that this result could have been reached by a contract otherwise drawn. The arrangement was cast into words which laymen would most naturally employ. Whenever possible men should be able to conduct their affairs in the usual and natural manner without fear of surprise by a rule of law of which they know nothing.

Admittedly, not all ore washed by this method will yield as much as the case discussed, but much of it will, and only the actual use of this method will disclose how much. For a number of years, I have been thinking about rules of law more from this angle than from any other, and my belief in its fruitfulness has constantly grown. Such doubts as I have encountered in others on this score have seemed to me to be based upon a failure to realize what to me is a conviction settled by experience, viz., that a very large part of the task of so examining rules of law is that of breaking through the crust of our accustomed non-functional mode of stating reasons for rules in order merely to discover what rules have important practical implications other than their certainty, to say nothing of the task of thereafter tracing out those implications. The effort to make them will show how broad the profitable field for such investigations is.

But more can be said. (1) If such investigations should happen always to bring us to the same conclusions to which our common sense judgment inclined us, they would still be worth their cost. The Institute's recommendation of a rule of law could thus be more fully backed up with facts of the kind that carry conviction. The work of the Institute would thereby carry added weight in the opinions of judges and lawyers, a matter of first importance. Moreover, such practical rationalizations of rules of law seem necessary for later extending or otherwise modifying them intelligently. (2) If any investigation disclosed an evenly balanced conflict of practical considerations, it still would have justified itself by giving to the person about to decide upon a rule of law the added caution which comes from complete awareness of the consequences of his decision. (3) Finally, such investigations as may give only neutral results by showing that either of a number of rules would work equally well if it merely were settled which was the law are not effort wasted. From the standpoint of sound scholarship, it is well worth while thus to eliminate the chance that important practical considerations are being overlooked.

It is true that it will require great effort and much time to go over the law in the manner proposed, but the results attained by such objective methods of investigation are certain to be more satisfactory. The alternative is to proceed in the traditional manner and to rely upon subjective common sense judgments as to how our proposed rules of law will affect the intricate structure of current life. Wholly to depend upon common sense judgments often means little more than relying upon a sort of instinctive empiricism. It means assuming that we know what rule of law to pick for a given business or other social situation, because back of the readiness to decide without investigation lies the basic assumption that we know social reality merely because we live in it. But we do not know social reality merely because we live in it, as has often been pointed out. The experience of any man, however broad, is limited to one time. It is usually limited to one people, to one class and even to one occupation. In the very simple scheme of life which once prevailed, questions between neighbors could be settled by neighbors with some assurance that the decisions were correct. Even though it be granted that complete reliance upon common sense judgments of the effects of law was justified when conditions of life were as simple as those of early England, it is not justified today when our whole industrial and commercial life is interlaced and intertangled with a technology which only experts can hope to understand.

Moreover, if our individual experiences were as broad as the life whose rules we must pass upon, complete reliance upon the common sense method of judging the effects of those rules would still be indefensible for the reason that all of our experiences do not go to make up our common sense judgments. Our individual temperament and our self-interests cause us subjectively to select from among our experiences those that satisfy our temperament and fortify our interests. Common sense judgments distilled from the small fraction thus taken from the total of social reality, with which the law is today dealing as it passes upon the current multitude of complicated human relations, often have little more than chance and instinct to assure their validity.

A large part of our law concerns business matters. A large part of the proposed research on the fact side would, therefore, be a study of modern industrial and commercial relations. Such a study would not mean that we were attempting to solve legal problems by applying economic theory as that term is commonly understood. Economic theory can be of slight help in restating the law, but the facts of economic life, as opposed to its theory, can be of great aid. Here lies an important distinction. Students of the law are criticized for placing too much faith in their ability to deduce correct solutions of practical problems from abstract principles themselves needing re-examination. I have heard this criticism made by economists whose

work in their own field rested upon the same unsound procedure. Until recently, economists quite generally were open to the same criticism. True, lawyers have built a legal system resting it partly upon general principles formulated by a Coke from his general experience and common sense observations. But economists also have been long content to evolve whole systems of economic theory from data no more reliable than the common sense observations of the structure of economic society made by such men as Adam Smith and John Stuart Mill. The soundness of such theory depends, of course, upon the adequacy and accuracy of those basic observations. It is true that those men observed the facts of life closely, but more accurate instruments of observation are now available and life has been changing all these years. Recently an increasing number of students of commercial and industrial activities have been putting less stress on economic theory and more on collecting for re-examination the facts as to the actual present operation of the social structure. They seem content to let future students do the necessary work in theory. An example of what this new approach will do in the economic field is what has been learned recently about the causes and remedies for industrial depressions. A patient application of statistical methods did this. What this movement may mean for the future of economic study is not important here, but it is of great importance to the work of restating the law. When economists talked only of such abstractions as "value theory" or "the theory of distribution," students of the law would not have found their work helpful, but now that they are attempting to marshall the facts as to how the machine for marketing goods is constructed and works, or when they produce the facts as to the structure and functioning of our credit organization, their work is full of material useful in deciding how to pick rules of law affecting those structures which will work well. It is fortunate that restating the law is being begun when this new movement in the study of business is well under way with some of its products already available for use.

The fact must be faced that judging the effects of rules of law by common sense conclusions is a method which economizes time and effort, while undertaking investigations means a great outlay of both. To employ an investigative procedure objective in its methods is a much larger task than might be supposed. Minimizing will not forward it. I think it a task so large, so important, so markedly a step forward and so full of promise of reasonable success that the Institute should do what it can to accomplish it. At this time, there is needed a preliminary survey of the problem and its possible solution as thorough as that made by the committee which had in hand the organization of The American Law Institute. The size and importance of the undertaking would make proceeding without such a preliminary study quite ill advised.

It may add concreteness to the proposal to suggest briefly some of the questions with which such a preliminary report might deal.

1. Making investigations as to the effects of law means that first the problems to be studied must be determined. That will be a surprisingly large part of the task. What rules need investigation? That will be difficult to find out, because familiar rules of law have a way of easily gliding with approval into accustomed places in our minds even though when examined in actual operation they will be found to be wasting much social energy by the friction with which they work. Ways and means for detecting such rules will need careful study.

2. Then there is the problem of getting the investigating done. This divides itself into two parts, using existing research agencies and creating agencies where none exists.

A. It will be found that there already exist very many agencies for making investigations, which can be used. They must be listed and the kind and quantity of work each can do must be learned in order to avoid duplication of effort. There are many agencies of a general kind, such as university graduate departments of social sciences, university schools of business, research departments of numerous business or professional associations, and the research facilities of some of our larger business organizations. Then there are the more specialized agencies, some of which are:

The National Bureau of Economic Research, New York City, Prof. Wesley C. Mitchell, Director; the Institute of Economics, Washington, D. C., Prof. H. G. Moulton, Director; the Institute of Land Economics, Madison, Wis., Prof. Ely, Director; the Russell Sage Foundation, New York City, John M. Glenn, Director; the Harvard Bureau of Business Research, Cambridge, Mass., Prof. Melville T. Copeland, Director; New York University Bureau of Business Research, New York City, Prof. Lewis Honey, Director; Northwestern University Bureau of Business Research, Chicago, Prof. Horace Sechrist, Director; Bureau of Markets of the Department of Agriculture, Department of Commerce; Bureau of Labor Statistics of Department of Labor; the Engineering Foundation of New York; the Institute of Government Research, Washington, D. C.; the National Industrial Conference Board, New York City; New York Bureau of Municipal Research; Engineering Economics Foundation, Boston, Mass.

The list could be extended. Ways must be found for knowing constantly and in detail all of these agencies, the size and type of problems upon which they can furnish data and for finding out otherwise how to use their resources wisely.

B. However numerous existing agencies are, a study will show that much of the ground which the Institute must cover none of them touch. What this ground is should be carefully ascertained and the investigating agency necessary to cover it should be considered. I want to return to this later.

3. The third problem is that of putting the mass of facts gathered into such form as to be of use to the Reporters engaged in restating the law. It is clear to me that the person in charge of all this investigation should be one thoroughly trained in the law, understanding its difficulties and concerned about its problems. That, I think, is vital. The masses of facts gathered will need most careful sifting for prejudice, and they will require digesting and interpretation in order to be put in a form useful to the Reporters who will be overloaded with other burdens. Only a close and careful student of the law can do these things. So, too, I think the investigators doing the detailed work should be trained in law in all cases possible.

It is easy to lose sight of the fact that lying between the scholarship in law and that in the other social sciences is a broad zone still untouched. Their interrelations have not been traced out. Students of the other social sciences have done little work in this area because of the legal factors complicating its problems. Those they cannot handle because the learning in law, as in medicine, is cast into a technique permitting only students of law to deal with it intelligently. To others it is a closed book. But the learning in the adjacent social sciences has no technique so obscure

as to prevent lawyers working therein intelligently. Only they can do it, and it must be done. Lawyers, not other social scientists, must move out on the task of setting up the necessary investigating machinery.

Only the mind of a lawyer can do the creative part of this investigating. Such creative part of the work must be done at two points: that of detecting the rules of law requiring, and admitting of, investigation as to their operation; and that of editing and interpreting the findings as to the facts. We shall not know how difficult that creative work is until we shall have tried to blast through the wall now unfortunately separating our learning in law from the other learning as to the structure and function of modern social and industrial life.

4. Returning to the new investigating agency which will need to be set up, it must be considered whether we should attempt no more than to supply the facilities required by the work of the Institute already begun. Some reasons for doing more than that bear on the need for a very full preliminary survey.

A. Contracts, Torts and Agency are basic subjects underlying the whole of our law. The reasons for undertaking to restate such general topics at the outset were sufficient but the difficulties which that involves are, I think, the most serious which the Reporters will face. In studying such general subjects, we are, so to speak, examining a whole landscape with field glasses, while those working in particular and limited fields of law, such as Insurance, Suretyship, and Bankruptcy, are examining the minute applications of the rules of these basic subjects with microscopes. It follows that unless early provision is made for ample study of the workings of these broad rules of law in the particular fields of human activities corresponding to those more limited subjects, two results are possible: (1) Our restatement of these basic subjects may embarrass restating the more limited subjects later, and (2) such restatement may encounter much hostile and pointed criticism from the experts in those more specialized fields.

B. Again, as the work of the Institute progresses, it should, and will, become more skilled. Such improvement will be promoted if we begin now to collect the facts on the operation of rules of law in fields to be later entered by the Institute. For instance, when the subject of Domestic Relations is reached, there should be on hand a whole series of monographs on the effects in practice of our rules of law in this difficult field where little thinking in terms of effects has been done since that of the Churchmen some centuries ago. Studies now made in special fields can be used at once on the general subjects and used later on the special subjects when their restatement is begun.

Finally, all of our law on the one side and our human activities on the other are so interlaced that the investigating machinery necessary to study a number of the fields will be no more than is needed to do well the work in the few fields already chosen for restatement. Then, too, it should be remembered that there will be other uses for those studies of facts necessary to make the work of the Institute sound. They will be available for use by the Commissioners on Uniform State Laws. They will be sought by legislative drafting services, thus coming to influence legislation. Other governmental commissions and executive offices will ultimately use them. If the investigations themselves represent sound scholarship, it will be difficult to waste effort or money in making them.

To begin studying our law in the manner proposed is to undertake a task most difficult, but it is a work much needed. If it be planned with sufficient courage and care, reasonable success can be expected. It is most promising that we are beginning to turn our attention to it.

Monopoly in Trade Names

"There was something quite adventurous in the lawsuit brought by an American publishing firm against Messrs. Hutchinson, the well-known publishers, to restrain them from using the word 'Adventure' as part of their title for a new magazine which they proposed to issue under the name Hutchinson's Adventure-Story Magazine. Mr. Justice Sargent, before whom the case came last week (Ridgway Company v. Hutchinson and Others; June 14), described it in his judgment as 'one of the boldest he had ever had to deal with.' And so it seems to us, though there are cases very near the line which touch it, almost, in boldness. In the present case, stripped from all suggestions of wrongful deception or passing off—as to which the learned judge held there was no case established by the plaintiffs which the defendants need bring any evidence to answer—the claim was reduced to a fine question of monopoly right. There are still some people, it appears, who believe that there is 'copyright in a title,' but a whole catena of cases, extending over a century and more, has established the contrary. Indeed, there are cases where the identical title has been taken (e.g. Dicks v. Yates (1881)) in which the Court has refused to interfere; the ground always being, as stated by Jessel, M.R., in that case, that there was no likelihood of mistake on the part of the public. But there was another difficulty in the plaintiffs' way here. Their title was purely descriptive. 'The authorities,' as Mr. Justice Sargent declared in his judgment, 'show that a person who uses a title which is descriptive must be prepared to allow other persons to use it as a description of similar articles. A person is not allowed to monopolize ordinary words in the English language.' That applies to publications as much as it does to saleable articles in general; and the burden of proving that the word 'Adventure' had become distinctive in this country of the plaintiff's magazine, and nothing else, was obviously too heavy a one for them to discharge, apart from the legal difficulties which confronted them at the outset of their venture." —The Law Journal, June 23, 1923.

The Last Appeal From the Irish Free State

"On the 14th inst., Lord Birkenhead, in delivering the judgment of the House of Lords in the case of the Motor Union Insurance Company v. Boggan, in which an Appeal was allowed from an order of the High Court of Appeal for Ireland, affirming an order of the Court of Appeal in Southern Ireland, said that he was probably adjudicating the last appeal to the House of Lords from Southern Ireland."—The Law Times, June 30, 1923.

As one object of the AMERICAN BAR ASSOCIATION JOURNAL is to afford a forum for the free expression of members of the bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of this JOURNAL assume no responsibility for the opinions in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

THE EARL OF BIRKENHEAD

By J. A. Strahan

Of the Middle Temple, Barrister-at-Law and Reader in Equity, Inns of Court, London

THE legal profession in England is divided into two sections—barristers and solicitors. Solicitors deal directly with the public; barristers only with solicitors. Solicitors do the "spade work" of the profession; and retain barristers to advise on difficult points and to conduct their cases in Court. The division resembles that between consultants and general practitioners in medicine, with this difference that in law the student must decide which class he will join before and not after he is qualified to practice.

Thus the work reserved for barristers is naturally small. Nevertheless the number of barristers is unnaturally large. Year after year, though they know that in the nature of things most of them cannot earn enough fees "to powder their wigs," the pick of English university men flock to the Bar, most of them to spend the best years of their life in unavailing toil and to end their toil in hopeless disappointment at the best or in personal degradation or premature death at the worst.

THE EARL OF BIRKENHEAD

The flame which attracts these human moths to their destruction blazes in a career such as that of Frederick Edwin Smith, first Earl of Birkenhead. This is its short record. By the time "F. E."—as he was later to be known—was 18 years of age he was a student and scholar of Wadham College, Oxford; by the time he was 24 he was fellow and lecturer of Merton College, Oxford; by the time he was 31 he was a rising junior at the Bar and a candidate for Parliament; by the time he was 36 he was a distinguished leader at the Bar and a member of Parliament; by the time he was 44 he was Attorney-General and a cabinet minister; and by the time he was 47 he was Lord High Chancellor of Great Britain and a peer of the realm. Now at 51 he is an earl and one of the well known public men in Europe. When any profession offers the possibility of such success it is idle to warn daring and ambitious youth of its possibility of failure unspeakable.

Just as medical men are divided into physicians and surgeons, so barristers are divided into lawyers and advocates. Advocates rarely are very learned and some of them who have won judgeships have reflected little lustre on the Bench. "F. E." was essentially an advocate; so when, on becoming Lord Chancellor, he took his seat as head of the Supreme Court of Appeal he was received without enthusiasm by that very learned, august and elderly tribunal. Yet before a year was over he dominated it, so much so that venerable law lords, not content with acquiescing in his judgments, have gone out of their way to praise them. Yet Lord Birkenhead is not a profoundly learned lawyer; he never had the pedestrian industry to become one; but he possesses a gift which in a Lord of Appeal is infinitely better, the gift of great receptivity and common sense. Cases which go as far as the House of Lords are invariably argued there by counsel very learned in the law. Every statute or case bearing on the point to be decided is sure to be cited; Lord Birkenhead absorbs all these; and when the time for decision comes applies them with a judgment which many more learned judges do not possess.

In his youth Disraeli made Vivian Gray disdain a lawyer's career because, as he said, he could not become a great lawyer without abandoning all hope of becoming a great man. This was really Disraeli's own view. The late Lord Bryce told me that in his old age Lord Beaconsfield said to some one that the only men whom he had ever met who had attained the highest distinction in law and still retained their common sense in other matters were Lord Lyndhurst and Lord Cairns. However, this may have been in the past it cannot be said to be so in the present. "F. E.," like his brilliant contemporaries, Gordon Hewett, now Lord Chief Justice of England, John Simon, lately Home Secretary, Douglas Hogg, now Attorney General, has been as distinguished in public as in legal business. And he shows none of that abject deference to the law because it is the law, which too frequently marks men who have long devoted their minds to

the service of Jurisprudence. Not a few good lawyers are like Lord Thurlow who when he was chaffed by a boon companion as to the contrast between his private morals and his public churchiness retorted indignantly, "I support the Church of England because it is the church by law established and I would do the same if Parliament established by law any other d—d church." Lord Birkenhead judges the law as he judges an appeal, on its merits. Not long ago he came to the conclusion that the law relating to land in England had now no merits. The result was his law of Property Act 1922, the most revolutionary reform that a law lord ever carried through the British legislature. That statute alone is sufficient to secure its author immortality in the annals of English jurisprudence.

In his private life Lord Birkenhead is genial and a little joyous; the fact that he had the nickname of "F. E." shows he was popular with his fellow barristers. But in public life he has always had a sharp temper and a sharper tongue. That was all right so long as they were directed only against the opponents of his own party; but when, after a split of the Conservatives over the Lloyd-George régime, he directed them against his own side, it was another matter. Now the bulk of the Conservatives regard him with deep aversion; and it is still on the lap of the gods whether Lord Birkenhead will be another Lord Brougham or another Lord Beaconsfield, the outlaw or the leader of a set of politicians who dislike him and whom he despises.

THE CORPORATION

A Little Essay Setting Forth the Many Important Services Performed by this Institution, Which Is Roundly Abused and Yet Trusted by Americans to the Farthest Limit

By WILLIAM W. COOK
Of the New York City Bar

IN an old English case,[1] decided in 1613, it is said "the opinion of Manwood chief Baron, was this, as touching Corporations, that they were invifible, immortall, and that they had no foule; and therefore no Subpoena lieth againft them, becaufe they have no confcience nor foule; a corporation is a body aggregate, none can create foules but God, but the King creates them, and therefore they have no foules." The average American believes that a corporation is not only soulless, but is also heartless, although not altogether brainless. This is a queer combination and is worth analysis.

It is a curious fact that while the Americans abuse the corporation oratorically, financially, politically and otherwise, yet they trust it to the farthest limit, farther than they trust individuals. The railroads of the country are entrusted to corporations only. Individuals are not allowed to own or operate them. So also with street railways, gas, electric light, telegraph, telephone and power companies and waterworks with rare exceptions. With equally rare exceptions the power of eminent domain is given to corporations alone. So great a trust is involved that the corporation cannot even transfer that trust except with the consent of the state.

Nor is this all. The tendency is to require all banks to be corporations. Private banks are dangerous. The public lose their deposits. Corporate banks on the other hand are regulated and examined *ad libitum*. But who cares? The corporation can be worked, worried, chastised, hamstrung and even executed without shocking the public conscience.

Then there is the recent change of sentiment as to trust estates, created by a will or during life. More and more the trust companies and banks are being made the trustees. They do not die and they obey the law in administering the trust. Personal trustees of large estates are somewhat under a cloud of late.

And in the recent war corporations were organized by the Government to carry on government activities and escape the red tape of bureaucracy. There, too, they did their part in that mighty rush of men, money and material to Europe, which enabled the American troops to immortalize Chateau Thierry, Belleau Wood, St. Mihiel Angle, the Argonne forest and the cutting of the German line of communications at Sedan.

The charities of the world are administered by corporations. They preserve, use and pass the funds on from age to age. They serve without pay, without appreciation and with very little recognition. They alleviate the sufferings of the world and ask nothing in return. They do their work continuously, unobstrusively and faithfully from generation to generation. And so in other ways. Choice private libraries are broken up and sold. The corporation alone preserves them. Man is mortal and full of vanity. The corporation is immortal and oblivious to fame.

The corporation is an industrial revolutionizer. It turns real estate, buildings and machinery into personal property. It owns them and to represent them issues certificates of stock—personal property. This makes liquid that which was frozen. Three hundred years ago the bulk of property was real estate; today it is personal property. The corporation did it. The corporation drags to the light hidden as well as immobile capital. Capital loaned on notes or mortgages or hoarded or deposited in banks may conceal itself, but capital invested in a corporation shows itself.

And it is the only form of wealth that can be absolutely controlled by the public. The charter may be annulled at the will of the legislature, under the reserved power. It may be "regulated" until it

1. Tipling v. Pexall, 2 Bulst. 233.

is sick nigh unto death. Its misdeeds may be dragged to light mercilessly. It is generally prejudged as an outlaw anyway by investigating committees and grand juries, and fines are meted out to it by the courts with lavish and unsparing hand. It has no friends and is kicked, cuffed, beaten, battered and knocked around utterly regardless.

Without the corporation great enterprises could not be carried on. It alone can supply the capital. It gathers the savings of millions to do work involving billions. The limited liability of the stockholders is the "open sesame" to the private wealth of the world. It unites the world by union of capital.

The corporation is the only way a man can engage in a hazardous venture and limit his loss and yet take part in the management. Tacitus said the men of the northern races were great gamblers and staked their personal freedom in the game. Tacitus, however, lived nearly two thousand years ago and hence was not familiar with the modern financial acrobat.

And the corporation may be taxed. Taxed indeed! The corporation is considered the legitimate prey of the tax gatherer. The political genius of today lies awake nights thinking up new modes of taxation. What the public is looking for is a political genius who will abolish old ones. As if already of taxes we have not a great sufficiency, it is now proposed that the nation and states shall tax each other's bonds interchangeably. The corporation, however, is the favorite target. It is taxed in multitudinous ways and in every conceivable way. It is capital that is impersonal. Prior to the recent war some of the states paid all of their state expenses from taxes on corporations. Taxes unlimited; taxes in eleven different ways on (1) the franchise; (2) the capital stock; (3) corporate real estate and personal property; (4) the stock and bonds as against the holders; (5) dividends; (6) corporate income or profits; (7) stock transfer—stamp taxes; (8) inheritances of stocks and bonds; (9) incorporation fees and increases of capital stock; (10) license fees; (11) duplicate federal taxes. Sometimes all three governments, federal, state and municipal, exact the same kind of toll, such as license fees and other choice assortments of tax wonders. The old barons on the hills had much to learn. The corporation may be soulless and heartless, yet for usefulness and tax purposes it surpasses anything in ancient or modern times. The marvel is that it survives at all. Sometimes it migrates, because, although it is a useful beast of burden, there is a limit to the load. When that limit is reached it silently folds its tent and steals away; just as capital always does if it can. The corporation then incorporates in another state or perhaps takes refuge in no par value stock. This New York device for getting something for little or nothing is a pretender in the corporate world—a "blind pool." The Attorney General of Michigan was right when he recently said such stock "has in most cases no tangible value except as it is given such by the earnings of the corporation."

Finally the corporation is the pet subject of experiment in the hospital of sociology. That new philosophy, which as applied by radicals would subvert constitutional principles, overturn *stare decisis*, teach a new jurisprudence to the young, and devote all things to social uplift, makes a specialty of operating on friendless corporations. Being impersonal, and reputed to be rich, and bearing a bad reputation, the corporation is carved up for social regeneration. If it dies it is a case of just retribution; if it lives it is an exemplification of supreme art. It is the victim of the top-lofty theories of sociology which resemble the top-lofty sails of Yankee craft, captured by the Europeans in the Napoleonic wars. The Europeans did not dare sail them and so they cut them off.

Great is the American, though somewhat ungrateful. The corporation is his faithful dog, his useful donkey, his seven leagued camel. It serves equally the high and the low, the rich and the poor, the wicked and the honest, the industrial king and the humble plodder. It is a wonder—the greatest of modern times. And it rules the world because it absorbs most of the talent of the world.

Women Lawyers' Association Meeting

The Women Lawyers' Association has arranged the date and place of its annual convention this year so as to make it possible for its members to attend their convention and that of the American Bar Association. An interesting program has been arranged, beginning with a reception Monday evening, August 27, by the Minnesota club women. On Tuesday morning the address of welcome will be delivered by William A. Lancaster, president of the Minnesota Bar Association, after which President Emilie M. Bulowa, of New York City, will deliver an address. Reports of officers and committees will follow. Tuesday afternoon there will be a conference on "Recent Legislation and Court Decisions of General Significance," an address by Ellen Spencer Mussey on "Legal Education," and talks on "Special Phases of Legal Education" by various speakers. On Tuesday evening there will be an address by E. Jean Nelson Penfield on "Uniform Marriage and Divorce Laws," followed by discussion. On Wednesday officers will be elected and there will be a luncheon conference on the General Policy of the Association and on "The Lawyer and Civic Leadership." The officers of the Association at present are: President, Emilie M. Bulowa; First Vice-President, Mary R. Towle; Second Vice-President, Amy Wrenn; Recording Secretary, Marion Gold Lewis; Corresponding Secretary, Anna Moscowitz Cross, Municipal Building, New York City; Treasurer, Henriette A. Neuhaus; Auditor, Oliver Scott Gabriel. Rose Falls Bress, 198 Jefferson Ave., Brooklyn, New York, is editor of the Women Lawyers' Journal, the official organ of the organization.

Charity—Mediums

"Until what is termed spiritualism is in a more advanced state it is not surprising that it was decided, in the recent case of Re Hummeltenberg Beatty v. London Spiritualistic Alliance (155 L. T. Jour. 127), that a bequest by will to the London Spiritualistic Alliance Limited, for the purpose of establishing a college for the training and developing of suitable persons, male and female, as mediums, was not a valid charitable bequest. In order to constitute a charity it is necessary to prove (1) That the gift would or might operate for the benefit of the public; and (2) that the trust was one which the court could (if necessary) administer and contral: (see Morice v. Bishop of Durham, 10 Ves. 539.")—The Law Times, July 7, 1923.

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PRESIDENT HARDING'S LAST MESSAGE

Warren Gamaliel Harding departed this life on August 2, 1923, a greater man than when on March 4, 1921, he was inaugurated President of the United States.

The Presidency itself called out his latent powers and under its responsibilities he developed and grew to greater stature.

He assumed that great office with the hope and confidence of a great constituency. He confirmed the faith of his friends and won the respect of his critics.

The time has not yet come for any adequate appraisal of President Harding's career. Here we shall consider only his attitude toward the Judicial Institution.

President Harding realized that modern civilization in its present form could not have been attained, nor could long endure, without effective means for the settlement of controversies between individuals other than force. He recognized that civilized men, as individuals, had laid aside the sword and shirt of mail, as a part of their daily attire, because of the invention of the judicial institution, and because the experience of men had proven that it was more satisfactory in the long run to submit these controversies to the courts for decision, than to settle them by combat.

With this high appreciation of the function of the judicial institution he made his appointments to the Federal bench, as one discharging a serious duty and not as one distributing political patronage. Considering the great increase in the number of judicial offices to be filled and the enormous pressure from those who through ignorance or effrontery seek to control appointments to the Federal bench for selfish ends, the profession cannot do less than acknowledge its indebtedness to President Harding for the high quality of his judicial appointments.

President Harding's appreciation of the vital importance of the judicial institution as a means for putting an end to private warfare led him to hope that at least a beginning could be made in the substitution of justice for war, in controversies between nations. Although he was among those who opposed entry into the League of Nations, he had become fully convinced that we could and should give our adhesion to the protocol establishing the Permanent Court of International Justice, with reservations clearly defining and strictly limiting the effect of our action.

This project seemed to him to be founded on sound analogies and inspired by high and noble ideals. He planned his last great journey for the purpose of bearing witness before his countrymen to the faith which was within him and to his conviction that America must do its part in the establishment of peace and the enlargement of the domain of justice.

To this noble cause which appealed strongly to his love of good, he devoted himself beyond his strength, and fell in action before he had attained his objective; but who shall say that the tragedy of his unexpected death has not made his last message more impressive and persuasive?

President Harding was always a genial and lovable man and these characteristics inspired, in return, the affection of the nation so that millions of sincere mourners stood everywhere in silent ranks on either side of the train which carried his mortal remains on that impressive journey from the Pacific to the Potomac.

BLACKSTONE—TWO HUNDRED YEARS AFTER

The two-hundredth anniversary of the birth of Blackstone fell on July 10 of the present year. It was not made the occasion of any special celebration by the profession in this country. But, what is of more importance, it found the Bar of the United States engaged in work inspired to a great extent by the spirit which moved the great English jurist to produce his "Commentaries." We mean the movement for the simplification of the law, not only on its procedural but also on its substantive side.

As is well known, the lectures on which the "Commentaries" were founded were delivered "largely with a view to making knowledge of the law, part of the intellectual equipment of every good citizen." The movement for the

simplication of procedure and of the law itself in the United States was of course primarily induced by the defects and difficulties in the administration of Justice itself, which called loudly for practical remedy if the law was to fulfil its function. But along with this essentially practical program has gone a clear understanding of the great value of making the law and its procedure as intelligible as possible to laymen. It is realized that the more the average man can understand of ordinary legal principle, and even of the why and wherefore of court procedure, the more likely he is to feel that the courts are not something remote from him and his interests, but institutions entitled to his respect and support. Moreover, such a diffusion of better understanding on so vital a matter must have a certain cultural value.

The effort at a restatement of the law by the American Law Institute, which is one of the most significant undertakings of this century in America, may seem at first blush considerably removed from the Blackstonian tradition of making the law a part of a gentleman's education. But it is the same spirit of help adapted to the needs of the time. The great Englishman wanted to make the law plain even to an intelligent layman. One present need is to make it plain to the lawyer—or at least to make it so that he can understand it without encountering difficulties which are in many cases almost overwhelming. This simplification of the law through restatement and clear classification cannot fail to have its results in more expeditious trials, clearer issues, less involved arguments, better opinions, —in brief, should play its part in making the law more intelligible to the fairly intelligent.

Aside from this, the lesson the profession may learn from Blackstone is the supreme importance of style. "In their literary quality lies the secret of their success," says the Law Journal in speaking of the Commentaries in a recent issue. Those who affect to decry such ornament may well ponder its inestimable value to one who has a message to deliver. Truly, style is not only the man, as has been said; it is immortality, when coupled with a great subject and adequate treatment. Science and study supply the body, but style supplies the wings that bear it through the centuries. Lawyers today may profit by paying more attention to this aspect of legal writing. Few of them can be Blackstones, but most of them can improve their intellectual professional output—whether it be brief, opinion, argument or memorandum—by realizing that form is a most substantial and practical thing.

A TIMELY DISCLAIMER

Mr. Justice Sutherland, speaking for the Supreme Court in the "Federal Maternity Act Case," has delivered an opinion which will repay intent perusal.

Every lawyer who is a student of the decisions of our highest tribunal must have felt a strain upon his patience at the recent utterances of uninformed critics of that high court, based in the most part on the utterly false and fallacious assumption that the Supreme Court of the United States assumed to declare acts of Congress and of the Legislatures of the several states void, merely because they were unconstitutional.

This is only half of the story. Either through ignorance or with design to win the applause of discontented elements, the other half of the story was ignored or suppressed, namely that acts of Congress were never declared invalid, except where such acts were challenged by suitors who appeared before the court in the due course of orderly judicial proceedings, and who showed that they were personally and financially affected in life, liberty or property by the enforcement of the act in question.

The Supreme Court reports are full of cases declaring the unwillingness of that tribunal to question the action of a co-ordinate department of government and its determination never to do so, except where such question is necessarily involved in a judicial proceeding regularly brought before them by one who had the right to raise the question.

Other critics have been heard to say that judges, and particularly those of the Supreme Court, were prone to enlarge their jurisdiction. There is probably no lawyer who has had any considerable experience in the argument of cases, either at *nisi prius* or on appeal, who does not know that accusation to be wholly unfounded, and based upon a total misconception of the judicial psychology. Every experienced practitioner knows that it is almost impossible to move a court along a new line, or into a new field. The judge demands precedents which will by sound principle or by convincing analogy justify the enlargement of the jurisdictional field or the application of a new remedy.

On both of these points laymen and those who have the title of lawyer, but whose professional studies have been overshadowed by political or financial interests, would profit by the consideration of the fundamental principles and historic review so clearly set forth in "Massachusetts vs Mellon."

REVIEW OF RECENT SUPREME COURT DECISIONS

Wage-Fixing Provision of Kansas Industrial Court Act Invalid as Violative of Due Process—State Attempt to Enjoin Enforcement of Congressional Maternity Act Does Not Present "Justiciable Controversy"—State Statute of Escheats Invalid as to National Banks—Alien Beneficiaries of Workmen's Compensation Act—Eminent Domain—Constitutionality of Moffat Tunnel Act of Colorado Upheld—Other Cases

By Edgar Bronson Tolman

Kansas Industrial Court Act

The Kansas Industrial Court Act, in so far as it permits the fixing of wages in the packing plant of plaintiff in error, is invalid because it takes property and liberty of contract without due process of law.

Wolff Packing Co. v. *Court of Industrial Relations of Kansas,* Adv. Ops. 756, Sup. Ct. Rep. 630.

The provisions of the Kansas Court of Industrial Relations Act, as summarized by the Chief Justice, are as follows:

> The Act declares the following to be affected with a public interest: First, manufacture and preparation of food for human consumption; second, manufacture of clothing for human wear; third, production of any substance in common use for fuel; fourth, transportation of the foregoing; fifth, public utilities and common carriers. The Act vests an Industrial Court of three judges with power upon its own initiative or on complaint to summon the parties and hear any dispute over wages or other terms of employment in any such industry and if it shall find the peace and health of the public imperiled by such controversy, it is required to make findings and fix the wages and other terms for the future conduct of the industry. After sixty days, either party may ask for a readjustment and then the order is to continue in effect for such reasonable time as the court shall fix, or until changed by agreement of the parties. The Supreme Court of the State may review such orders and in case of disobedience to an order that court may be appealed to for enforcement.

The question of the constitutionality of this statute was raised by mandamus proceedings brought by the Court to compel the Wolff Packing Company, a small meat-packing corporation of Kansas, to comply with an order of the Court requiring the company to increase wages paid to its employees. The order had been duly entered after a hearing and findings. The Supreme Court of Kansas appointed a commissioner who reported that the company had operated under a loss, and that there was no sufficient evidence of an emergency to justify action by the Industrial Court. It was admitted that the company was losing money and evidence was introduced showing that the Wolff company was associated with packers in active competition with the "Big Five" packers and that it could secure all necessary labor at the wages it offered. But the State Supreme Court, relying on a forecast of better business conditions, overruled this report. The company brought the case on writ of error to the Supreme Court of the United States, where the judgment was reversed.

The Chief Justice delivered the opinion of the Court. After reviewing the facts, he said:

> The necessary postulate of the Industrial Court Act is that the State representing the people is so much interested in their peace, health and comfort that it may compel those engaged in the manufacture of food, and clothing, and the production of fuel, whether owners or workers, to continue in their business and employment on terms fixed by an agency of the State if they can not agree.

The Act did, he said, allow an employer to cease business or an employee to quit work under certain conditions, but, he continued:

> These qualifications do not change the essence of the Act. It curtails the right of the employer on the one hand, and of the employee on the other, to contract about his affairs. This is part of the liberty of the individual protected by the guaranty of the due process clause of the Fourteenth Amendment.

The exceptional circumstances which it was contended made the Act neither arbitrary nor unreasonable were thus stated:

> First. The Act declares that the preparation of human food is affected by a public interest and the power of the legislature so to declare and then to regulate the business is established in Munn v. Illinois (and other cases).
>
> Second. The power to regulate a business affected with a public interest extends to fixing wages and terms of employment to secure continuity of operation. Wilson v. New, 243 U. S. 332, 352, 353.

The learned Chief Justice said that businesses clothed with a public interest might be divided into three classes: (1) Those carried on by virtue of the grant of special privilege, as railroads; (2) those historically so regarded, as keepers of inns and grist mills; and (3) those that have come to have a peculiar relation to the public, as explained in Munn v. Illinois. Businesses could not be put in this third group, he added, by the mere declaration of a legislature. He continued:

> In a sense, the public is concerned about all lawful business because it contributes to the prosperity and well being of the people. The public may suffer from high prices or strikes in many trades, but the expression "clothed with a public interest," as applied to a business, means more than that the public welfare is affected by continuity or by the price at which a commodity is sold or a service rendered. The circumstances which clothe a particular kind of business with a public interest, in the sense of Munn v. Illinois and the other cases, must be such as to create a peculiarly close relation between the public and those engaged in it, and raise implications of an affirmative obligation on their part to be reasonable in dealing with the public.

The learned Chief Justice distinguished cases where legislative declarations had been regarded as decisive of the existence of a public use (rather than a "public interest"). He then said:

> In the preparation of food, the changed conditions have greatly increased the capacity for treating the raw product and transferred the work from the shop with few employees to the great plant with many. Such regulation of it as there has been, has been directed toward the health of the workers in congested masses, or has consisted of inspection and supervision with a view to the health of the public. But never has regulation of food preparation been extended to fixing wages or the prices to the public, as in the cases cited above where fear of monopoly prompted, and was held to justify, regulation of rates. There is no monopoly in the preparation of foods. The prices charged by plaintiff in error are, it is conceded, fixed by competi-

tion throughout the country at large. Food is now produced in greater volume and variety than ever before. Given uninterrupted interstate commerce, the sources of the food supply in Kansas are country-wide, a short supply is not likely, and the danger from local monopolistic control less than ever.

It is very difficult under the cases to lay down a working rule by which readily to determine when a business has become "clothed with a public interest." . . . We are relieved from considering and deciding definitely whether preparation of food should be put in the third class of quasi-public businesses, noted above, because even so, the valid regulation to which it might be subjected as such, could not include what this Act attempts. . . .

To say that a business is clothed with a public interest is not to import that the public may take over its entire management and run it at the expense of the owner. The extent to which regulation may reasonably go varies with different kinds of business. The regulation of rates to avoid monopoly is one thing. The regulation of wages is another. A business may be of such character that only the first is permissible, while another may involve such a possible danger of monopoly on the one hand, and such disaster from stoppage on the other, that both come within the public concern and power of regulation.

He considered the expressed purpose of the Industrial Court Act, namely the preservation of continuity of food, clothing and fuel supplies, and showed how public regulation could not secure such continuity, because the theory first laid down in Munn v. Illinois was that the owner devoted his property to a public use by a revocable grant only, and could go out of business when he pleased. He continued:

If that be so with the owner and employer, a fortiori must it be so with the employee. It involves a more drastic exercise of control to impose limitations of continuity growing out of the public character of the business upon the employee than upon the employer, and without saying that such limitations upon both may not be sometimes justified, it must be where the obligation to the public of continuous service is direct, clear and mandatory and arises as a contractual condition express or implied of entering the business either as owner or worker. It can only arise when investment by the owner and entering the employment by the worker create a conventional relation to the public somewhat equivalent to the appointment of officers and the enlistment of soldiers and sailors in military service.

It was argued that the Act should be sustained because of the existence of an emergency like that justifying the congressional act fixing wages of railroad employees sustained in Wilson v. New, 243 U. S. 332, or that relied on in the rent-regulation cases such as Block v. Hirsh, 256 U. S. 135. The learned Chief Justice declared that the danger here relied on was not found to exist by the legislature but was to be determined by a subordinate agency, and was in fact remote. The principal distinction, however, he stated as follows:

The power of a legislature to compel continuity in a business can only arise where the obligation of continued service by the owner and its employees is direct and is assumed when the business is entered upon. A common carrier which accepts a railroad franchise is not free to withdraw the use of that which it has granted to the public. It is true that if operation is impossible without continuous loss (citing cases), it may give up its franchise and enterprise, but short of this, it must continue. Not so the owner when by mere changed conditions his business becomes clothed with a public interest. He may stop at will whether the business be losing or profitable.

The case was argued by Messrs. D. R. Hite and John S. Dean for the packing company and by Messrs. John G. Egan and Chester I. Long for the state authorities.

Supreme Court—Justiciable Controversies, Political Questions

A suit by a State, or by a taxpayer of the United States, to enjoin the enforcement of the Maternity Act as an unconstitutional attempt by Congress to legislate outside its powers does not present a justiciable controversy of which the Supreme Court of the United States may take jurisdiction.

Massachusetts v. *Mellon* and *Frothingham* v. *Mellon*, Adv. Ops. 676, Sup. Ct. Rep. 597.

The first of these two cases was an original suit brought by the Commonwealth of Massachusetts against the Secretary of the Treasury and other federal officers. The second came to the Supreme Court of the United States on appeal from the Court of Appeals of the District of Columbia, where a decree of the Supreme Court of the District dismissing a taxpayer's bill against the same defendants had been affirmed. Both suits sought to enjoin the enforcement of the Maternity Act of Congress, whereby money was appropriated for maternity welfare in such states as should comply with conditions laid down by the Act and whereby a federal bureau was created to administer its provisions in co-operation with the States. The contention of Massachusetts was that the appropriation was for purposes local and not national and that the Act was passed to coerce the States into yielding some of their sovereign rights. In the taxpayer's suit the plaintiff alleged that under the guise of taxation the Act deprived her of her property without due process of law. The Supreme Court of the United States held that it had jurisdiction of neither controversy, dismissed the original suit and affirmed the decree of the Court of Appeals of the District of Columbia.

Mr. Justice Sutherland delivered the opinion of the Court. He stated the conclusion reached in the following words:

In the first case, the state of Massachusetts presents no justiciable controversy either in its own behalf or as the representative of its citizens. The appellant in the second suit has no such interest in the subject-matter, nor is any such injury inflicted or threatened, as will enable her to sue.

Considering first the contention of Massachusetts, he said:

Probably it would be sufficient to point out that the powers of the state are not invaded, since the statute imposes no obligation, but simply extends an option which the state is free to accept or reject. But we do not rest here. Under article 3, par. 2, of the Constitution, the judicial power of this court extends to controversies . . . between a state and citizens of another state," and the court has original jurisdiction "in all cases . . . in which a state shall be a party." The effect of this is not to confer jurisdiction upon the court merely because a state is a party, but only where it is a party to a proceeding of judicial cognizance. Proceedings not of a justiciable character are outside the contemplation of the constitutional grant.

He quoted from Wisconsin v. Pelican Ins. Co., 127 U. S. 265:

" . . . The grant is of 'judicial power,' and was not intended to confer upon the courts of the United States jurisdiction of a suit or prosecution by the one state, of such a nature that it could not, on the settled principles of public and international law, be entertained by the judiciary of the other state at all."

After reviewing other cases in which the line between controversies judicial and political was laid down, he continued:

What, then, is the nature of the right of the state here asserted, and how is it affected by this statute? Reduced to its simplest terms, it is alleged that the statute constitutes an attempt to legislate outside the powers granted to Congress by the Constitution, and within the field of local powers exclusively reserved to the states. Nothing is added to the force or effect of this assertion by the further incidental allegations that the ulterior purpose of Congress thereby was to induce the states to yield a portion of their sovereign rights;

that the burden of the appropriations falls unequally upon the several states, and that there is imposed upon the states an illegal and unconstitutional option either to yield to the Federal government a part of their reserved rights, or lose their share of the moneys appropriated. But what burden is imposed upon the states, unequally or otherwise? Certainly there is none, unless it be the burden of taxation, and that falls upon their inhabitants who are within the taxing power of Congress as well as that of the states where they reside. Nor does the statute require the states to do or yield anything. If Congress enacted it with the ulterior purpose of tempting them to yield, that purpose may be effectively frustrated by the simple expedient of not yielding.

In the last analysis, the complaint of the plaintiff state is brought to the naked contention that Congress has usurped the reserved powers of the several states by the mere enactment of the statute, though nothing has been done and nothing is to be done without their consent, and it is plain that that question, as it is thus presented, is political and not judicial, in character, and therefore is not a matter which admits of the exercise of the judicial power.

The learned Justice quoted from the famous cases of Georgia v. Stanton, 6 Wall. 50, in which Georgia and Mississippi sought to enjoin the enforcement of the Reconstruction Acts, and Cherokee Nation v. Georgia, 5 Pet. 1, cases where it was held that no judicial controversy was presented.

The conclusion on this point was expressed as follows:

It follows that in so far as the case depends upon the assertion of a right on the part of the state to sue in its own behalf we are without jurisdiction. In that aspect of the case we are called upon to adjudicate, not rights of persons or property, not rights of dominion over physical domain, not quasi sovereign rights actually invaded or threatened, but abstract questions of political power, of sovereignty, of government.

The learned Justice likewise held that the State might not maintain such a suit as the representative of her citizens. He said in part:

The citizens of Massachusetts are also citizens of the United States. It cannot be conceded that a state, as parens patriae, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof. While the state, under some circumstances, may sue in that capacity for the protection of its citizens (citing cases), it is no part of its duty or power to enforce their rights in respect of their relations with the Federal government. In that field it is the United States, and not the state, which represents them as parens patriae, when such representation becomes appropriate, and to the former, and not to the latter, they must look for such protective measures as flow from that status.

As to the taxpayer's suit, he said (referring to cases where a taxpayer was allowed to enjoin illegal use of the moneys of a municipal corporation):

The reasons which support the extension of the equitable remedy to a single taxpayer in such cases are based upon the peculiar relation of the corporate taxpayer to the corporation, which is not without some resemblance to that subsisting between stockholder and private corporation. 4 Dill. Mun. Corp. 5th ed. pars. 1580 et seq. But the relation of a taxpayer of the United States to the Federal government is very different. His interest in the moneys of the Treasury—partly realized from taxation and partly from other sources—is shared with millions of others; is comparatively minute and indeterminable, and the effect upon future taxation of any payment out of the funds so remote, fluctuating and uncertain that no basis is afforded for an appeal to the preventive powers of a court of equity.

The learned Justice adverted to the great inconveniences which would attend a contrary result, and said in conclusion:

The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them, and to the judiciary, the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other, and neither may control, direct, or restrain the action of the other. We are not now speaking of the merely ministerial duties of officials (citing case). We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. . . . Looking through forms of words to the substance of their complaint, it is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional, and this we are asked to prevent. To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department—an authority which plainly we do not possess.

This deliberate and timely utterance of the court is commended to the attention of those who declaim against what they mistakenly term a tendency of the court to expand its jurisdiction and to set itself up as a censor of legislative action.

The cases were argued by Messrs. J. Weston Allen and Alexander Lincoln for Massachusetts, by Mr. William L. Rawls for the plaintiff taxpayer, and by Solicitor General Beck for the federal authorities.

National Banks,—Escheat

The California statute escheating to the State deposits unclaimed for twenty years is invalid as to National Banks.

First National Bank of San Jose v. *California et al.*, Adv. Ops. 691, Sup. Ct. Rep. 602.

Section 1273 of the California Code of Civil Procedure provides for the escheat to the State of bank deposits where no entries or withdrawals have been made for twenty years and the whereabouts of the depositors are unknown. Acting under this section the Attorney General of California sued the First National Bank of San Jose to compel payment of such a deposit and obtained a judgment which was affirmed by the State Supreme Court. The Bank brought the case by a writ of error to the Supreme Court of the United States, where the judgment was reversed.

Mr. Justice McReynolds delivered the opinion of the Court. After declaring the general principle that a State may not place any control upon national banks which conflicts with federal legislation or frustrates its purposes or impairs the efficiency of the bank to discharge its duties, he said (quoting from an earlier case):

"National banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end. . . . Being such means, brought into existence for this purpose, and intended to be so employed, the States can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit. Anything beyond this is 'an abuse, because it is the usurpation of power which a single State cannot give.'" Farmers' and Mechanics' National Bank v. Dearing, 91 U. S. 29, 33, 34.

Does the statute conflict with the letter or general object and purposes of the legislation by Congress? Obviously, it attempts to qualify in an unusual way agreements between national banks and their customers long understood to arise when the former receive deposits under their plainly granted powers. If California may thus interfere other States may do likewise, and, instead of twenty years, varying limitations

may be prescribed—three years, perhaps, or five, or ten, or fifteen.

We cannot conclude that Congress intended to permit such results. They seem incompatible with the purpose to establish a system of governmental agencies specifically empowered and expected freely to accept deposits from customers irrespective of domicile with the commonly consequent duties and liabilities. The depositors of a national bank often live in many different States and countries, and certainly it would not be an immaterial thing if the deposits of all were subject to seizure by the State where the bank happened to be located. The success of almost all commercial banks depends upon their ability to obtain loans from depositors, and these might well hesitate to subject their funds to possible confiscation.

The case was argued by Mr. S. F. Leib for the Bank and by Mr. U. S. Webb, Attorney General of California, for the State.

Workmen's Compensation Acts.—Alien Beneficiaries

A workmen's compensation act allowing compensation to non-resident alien dependents of employees killed in industrial accidents does not deny due process of law.

Madera Sugar Pine Co. v. *Industrial Accident Commission of California,* Adv. Ops. 663, Sup. Ct. Rep. 604.

These two cases arose under the Workmen's Compensation Act of California, a compulsory act under which employees in all but certain industries are awarded compensation for injuries occurring in the course of their employment, and dependents of employees killed in industrial accidents are allowed to recover death benefits gauged by the previous wages and the extent of the dependency. Two employees of the Madera Sugar Pine Company were killed under circumstances permitting their dependents to recover compensation under this act, and the State Industrial Accident Board made awards. The State Supreme Court denied petitions for writs to review these awards, and thereupon writs of error, with supersedeas, were allowed by the Chief Justice of the Court. The Company's only contention was that the act as construed and here applied to require compensation to be paid to dependents who were non-resident aliens operated to deprive it of property without due process of law The argument was that the interest of the State lay in preventing dependents of employees from becoming public charges, and so required payment of compensation from employers innocent of legal wrong, but that this interest of the State could not extend to foreign dependents. This contention did not prevail, however, with the Supreme Court of the United States, which affirmed the decrees.

Mr. Justice Sanford delivered the opinion of the Court. He said:

> This argument, however, erroneously assumes that in a compensation act of this character the constitutionality of the provision for death benefits is to be separately determined, independently of the general scope of the act, and solely with reference to the relation of the beneficiaries to the employer and to the State.
>
> Provision is universally made in workmen's compensation acts for compensation not only to disabled employees but to the dependents of those whose injuries are fatal. And the two kinds of payment are "always regarded as component parts of a single system of rights and liabilities arising out of" the relation of employer and employee (citing cases).

The learned Justice cited cases in which similar statutes had been sustained as valid exercise of the police power, and declared that these opinions made it clear that:

> . . . the compensation to dependents is merely a part of the general scheme of compensation provided by these acts for the loss resulting from the impairment or destruction of the earning power of an employee caused by an industrial accident, which in case of his death is paid to those whom he had supported by his earnings and who have suffered a direct loss through the destruction of his earning power. And it is clear that the underlying reason of these decisions applies alike to all dependents who by his death have been deprived of their support, whether they be residents or non-residents of the State.

The quasi-insurance of these acts, he said, might legally go to the dependent to whom the employee might naturally have made his insurance payable. The learned Justice adduced the analogy of employers' liability acts, held valid although benefiting foreign as well as resident beneficiaries, and then said:

> Such employers' liability statutes are designed to benefit all employees (citing case). They have the interest of the employees in mind and are primarily for the protection of their lives; the action is given to the beneficiaries on their account and they are not intended to be less protected if their beneficiaries happen to live abroad (citing case). "Many of these toilers in mines, on public works, railroads and the numberless fields of manual labor, receive a moderate wage, and are compelled to leave in foreign lands those who are dependent upon them and for whose support they patiently work on, indulging the hope that ultimately they may bring to these shores a mother or wife and children. . . . The statute not only benefits the survivors, but protects the laboring man. . . . The laborer, leaving wife and children behind him and coming here from abroad, has a right to enter into a contract of employment, fully relying upon the statute."

The case was argued by Mr. H. E. Barbour for the company and by Mr. Adolphus E. Graupner for the Commission and the beneficiaries.

Eminent Domain

A statute condemning land for a municipal water supply may validly require the city to permit other municipalities within the drainage district to take water at fair wholesale rates.

Such a statute may not diminish the right to recover damages for property today; it may grant the right to recover additional elements of damage, and in so doing, may classify and limit the additional rights of action so created.

Permitting the municipality to lease or otherwise dispose of property taken before compensation is made does not deny due process of law, provided methods are established to issue such compensation with reasonable certainty and promptness.

Joslin Mfg. Co. v. *City of Providence,* Adv. Ops. 723, Sup. Ct. Rep. 684.

In 1915 the legislature of Rhode Island passed an act designed to secure a pure water supply for the City of Providence. The act created a Water Supply Board with large powers to make a plan for the construction of reservoirs and waterworks and authorized the city to condemn land, water rights and other property therefor. The owners were given the right to recover for certain unusual items of damage, and certain municipalities within the drainage district were permitted to buy water from the City of Providence at reasonable wholesale rates. The statute contains a large number of provisions, but this brief statement must suffice for the purposes of this review.

The constitutionality of the act was raised by bills brought by certain owners of land and mills and certain taxpayers in the City of Providence to restrain the

city authorities from taking possession of their property. The Superior Court of Rhode Island certified the cases to the State Supreme Court which held the statute constitutional and sent back the record. Thereupon the Superior Court dismissed the bills, and from this decree the case came on writ of error to the Supreme Court of the United States, where the decree was affirmed.

Mr. Justice Sutherland delivered the opinion of the Court. The first contention considered was that the statute, in giving the municipalities the right to take water, authorized an expenditure partly for the benefit of other municipalities, and so imposed a burden upon the taxpayers of Providence. The learned Justice said:

> That the taxpayers of one municipality may not be taxed arbitrarily for the benefit of another may be assumed; but that is not the case here presented. The communities to be supplied are those within the drainage area of the waters authorized to be taken. These waters are under the primary control of the State and in allowing the City of Providence to appropriate them, it was entirely just and proper for the legislature to safeguard the necessities of other communities who might be dependent thereon, and to that end to impose upon the City of Providence such reasonable conditions as might be necessary and appropriate. Municipalities are political subdivisions of the State and are subject to the will of the legislature (citing case) and may be compelled not only to recognize their legal obligations, but to discharge obligations of an equitable and moral nature as well.

It was also argued that the statute violated the equal protection and due process clauses by

> permitting the owner of a business established prior to the passage of the act to recover for injury thereto while withholding such compensation from one whose business has been established since, and by allowing a mill owner to recover the cost of removing his machinery to a new location within the New England States, while denying a similar right to one desiring to move to a location elsewhere.

On this point he said in part:

> Injury to a business carried on upon lands taken for public use, it is generally held, does not constitute an element of just compensation (citing authorities), in the absence of a statute expressly allowing it (citing cases). This statute therefore does not deny a right; it grants one, and limits it to a business already established. We cannot say that such a classification is unreasonable or arbitrary—and certainly, it is not clearly so. The law-making body legislated with reference to an existing situation. . . .
>
> If the geographical limitation upon the liability to pay for the removal of machinery could be said of bring about a classification, the principles just discussed would control; but, in fact, there is no classification. The right is extended to all mill owners, who choose to avail themselves of it, to recover the cost of removal within the defined territory. . . . In respect of the contention that the statute extends the right to recover compensation so as to include these and other forms of consequential damages and thus deprives plaintiffs in error, as taxpayers of the city, of their property without due process of law, we need say no more than that, while the legislature was powerless to diminish the constitutional measure of just compensation, we are aware of no rule which stands in the way of an extension of it, within the limits of equity and justice, so as to include rights otherwise excluded.

The third contention was stated and answered as follows:

> We next consider the contention that the act permits the taking of property and grants the power to lease, sell or dispose of it without an offer to pay compensation therefor or a determination of it in advance. It has long been settled that the taking of property for public use by a State or one of its municipalities need not be accompanied or preceded by payment but that the requirement of just compensation is satisfied when the public faith and credit are pledged to a reasonably prompt ascertainment and payment, and there is adequate provision for enforcing the pledge.

The learned Justice found that the provisions guaranteeing payment to the owner, including the right of appeal to the court and the right to have execution against the city, adequately fulfilled the requirement just stated.

Finally, he said:

> The validity of the act is challenged as denying due process of law, on the ground that the question of the necessity for taking the property has not been determined by the legislature itself, but is relegated to the city to decide ex parte, without appeal or opportunity for hearing and decision by an impartial tribunal. That the necessity and expediency of taking property for public use is a legislative and not a judicial question is not open to discussion (citing cases). Neither is it any longer open to question in this court that the legislature may confer upon a municipality the authority to determine such necessity for itself.

The case was argued by Mr. Robert H. McCarter for the property owners and by Mr. Albert A. Baker for the city authorities.

Eminent Domain,—Public Purpose

Land may be condemned for a public highway serving no business convenience but simply for pleasure and recreation.

Making the ruling of county authorities conclusive evidence of the necessity of taking land for a public highway, although without giving the owners a hearing, does not deny due process of law.

Rindge Co. et al. v. *County of Los Angeles,* Adv. Ops. 704, Sup. Ct. Rep. 689.

The plaintiffs in error were the owners of certain land condemned for a public highway by county authorities in California. The Superior Court of Los Angeles County entered judgment for the County, and this judgment was affirmed by a District Court of Appeal of California and, on writ of error, again by the Supreme Court of the United States. The questions involved were two, whether the uses for which the land was taken were public uses, and whether the taking was necessary to such uses. A California statute provided that an affirmative two-thirds vote of the proper legislative body of the county should be conclusive evidence of the public necessity for a proposed improvement and that the property to be taken was necessary therefor; in this case such action had been taken. The Superior Court construed this section to make the legislative finding *prima facie* evidence only and admitted evidence offered by the owners, but the state appellate court held that the statute made the finding conclusive and was nevertheless constitutional.

Mr. Justice Sanford delivered the opinion of the Court. The first question arose out of the peculiar location of the proposed highway. This was to traverse a ranch owned by plaintiffs in error along a rugged mountain range and near the coast not far from Santa Monica. But the road was not to serve any business necessity, nor was it to connect any existing highways, but in fact one of its termini and that of a branch road to be laid out at the same time were to lie within the boundaries of the ranch, without meeting any other public way. The learned Justice stated the contention thus:

> The ranch owners concede that a genuine highway, in fact adapted as a way of convenience or necessity for public use and travel, is a public use. Their real contention is that these particular roads, while called

highways, are "highways" in name merely, that is, that they are shams under the name of public improvements, which cannot, in fact, furnish ways of convenience or necessity to the traveling public.

In answer to this argument he pointed out that many people would have access to the road by way of the highway connecting at the one end, and by means of private roads. He said:

> It is not essential that the entire community, nor even any considerable portion, should directly enjoy or participate in an improvement in order to constitute a public use. . . . A highway can be legally laid out terminating at a state line even though there be no connecting highway in the adjoining State and no definite official action has been taken to establish such connecting highway; otherwise great embarrassment and difficulty would be experienced in establishing highways across state lines (citing case). So, as to county highways. Public road systems, it is manifest, must frequently be constructed in instalments, especially where adjoining counties are involved. In determining whether the taking of property is necessary for public use not only the present demands of the public, but those which may be fairly anticipated in the future, may be considered.

He continued:

> But aside from these considerations, these roads, especially the main road, through its connection with the public road coming along the shore from Santa Monica, will afford a highway for persons desiring to travel along the shore to the county line, with a view of the ocean on the one side, and of the mountain range on the other, constituting, as stated by the trial judge, a scenic highway of great beauty. Public uses are not limited, in the modern view, to matters of mere business necessity and ordinary convenience, but may extend to matters of public health, recreation and enjoyment. Thus, the condemnation of lands for public parks is now universally recognized as a taking for public use (citing case). A road need not be for a purpose of business to create a public exigency; air, exercise and recreation are important to the general health and welfare; pleasure travel may be accommodated as well as business travel, and highways may be condemned to places of pleasing natural scenery (citing case). The Riverside Drive in New York is as essentially a highway for public use as Broadway; the Speedway in this city, as Pennsylvania Avenue. And, manifestly, in these days of general public travel in motor cars for health and recreation, such a highway as this, extending for more than twenty miles along the shores of the Pacific at the base of a range of mountains, must be regarded as a public use.
>
> For these reasons we conclude that these highways will, as found by the trial judge, afford accommodation to the travelling public and that the taking of land for them is a taking for public use authorized by the laws of California.

Referring to the construction placed upon the statute by the State District Court of Appeals that the resolution of the county board was conclusive evidence of the necessity of taking the highway, he said:

> So construed this statute is not in conflict with the Fourteenth Amendment, either because it fails to provide for a hearing by the landowners before such resolution is adopted, or otherwise. The necessity for appropriating private property for public use is not a judicial question. This power resides in the legislature, and may either be exercised by the legislature or delegated by it to public officers. "Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the State may designate. They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment." Bragg v. Weaver, 251 U. S. 57, 58. "That the necessity and expediency of taking property for public use is a legislative and not a judicial question is not open to discussion. . . . Neither is it any longer open to question in this court that the legislature may confer upon a municipality the authority to determine such necessity for itself. . . . The question is purely political, does not require a hearing, and is not the subject of judicial inquiry." Joslin Mfg. Co. v. City of Providence, decided today.

The case was argued by Messrs. Edward Stafford and Nathan Newby for the ranch owners and by Mr. Paul Vallee for the county authorities.

Local Improvements,—Special Assessments, Public Purpose

A tunnel intended to furnish a highway to be leased to public transportation companies, even though one railroad is primarily benefited, is a local improvement for which a special assessment may be levied.

Milheim v. *Moffat Tunnel Improvement District*, Adv. Ops. 709, Sup. Ct. Rep. 694.

This case presented the question of the constitutionality of the Moffat Tunnel Act, passed by the Colorado legislature in 1922. The Act created an Improvement District which embraced nine counties adjoining a tunnel to be built through the Continental Divide. The use of this tunnel was to be leased to railroads and other transportation companies. A Commission was created and authorized to manage the District, construct the tunnel, issue bonds to pay for its cost, and to levy special assessments upon all the property within the District in proportion to benefits and pursuant to notice and hearing. The Act declared that the special benefits accruing to the property by reason of the improvement were in excess of the cost of the improvements and the assessments provided for.

After the Commission had levied a fifteen per cent assessment on all the property within the District, and after due notice, certain property owners, without appearing before the Commission to file their objections, brought a bill to enjoin the District from enforcing the Act. Their main contention was that as the tunnel was to benefit principally the Denver-Salt Lake Railroad, known as the Moffat Road, and the primary purpose of the Act, as expressed by the Governor and others, was to save this line from being abandoned, the construction of the tunnel was not a local improvement for a public purpose. Other objections rested upon the manner in which the special assessments were imposed.

The Supreme Court of Colorado sustained the District Court in dismissing the complaint and upon writ of error the decree was affirmed by the Supreme Court of the United States.

Mr. Justice Sanford delivered the opinion of the Court. After citing Rindge Co. v. County of Los Angeles, reviewed *supra*, and other cases to the effect that the declaration of a legislature that a use was public should be regarded by the courts with great respect, he said:

> Here the legislature, familiar with the local conditions, has declared that the construction of the tunnel will benefit the people of the State; both the local court of the State and its Supreme Court have held its construction to be for a public purpose.
>
> It is urged by the landowners that the tunnel, considered as an isolated transportation unit, will serve no useful public purpose. This is obvious, but not to the point. It is intended to furnish an avenue or highway which shall be leased to public transportation agencies. A structure intended for such use is unquestionably a public improvement for a public use.

Referring to the purpose of the Act to prevent the Moffat Road from being abandoned, he said:

> This, however, is not a private purpose. The use of the tunnel by the Moffat Road will be for a beneficial public purpose.

The learned Justice made clear how the tunnel would shorten the route of the railroad, greatly lessen

the cost of its operation, and thus relieve its embarrassed financial condition, and continued:

> Evidently the preservation of this railroad, a common carrier of persons and property, as a means of communication between the eastern and northwestern portions of the State, is a matter of great public importance, and a tunnel enabling it to provide quicker and cheaper transportation during all seasons of the year will greatly promote the public welfare.
>
> Even if this Act specifically directed that the tunnel be leased to the Moffat Road for railroad purposes (a just rental based on the cost of constructing and maintaining the tunnel being provided), as the tunnel would be operated by the railroad as a public highway for the carriage of passengers and freight, it would be a public improvement for a public use. The test of the public character of an improvement is the use to which it is to be put, not the person by whom it is to be operated.

He quoted from cases holding that a subway tunnel is a local improvement and from others upholding the right to levy taxation in aid of a railroad, and pointed out that in fact the Moffat Road was not to be the only user of the proposed tunnel, but that it was to serve other public utilities, and also the general public as a highway for vehicles.

The learned Justice next considered the contention that the imposition of assessments constituted an arbitrary classification because in fact no benefit would accrue to the lands within the district as distinguished from those outside. He said:

> It is well settled, however, that if a proposed improvement is one which the State has authority to make and pay for by assessments on property benefited, the legislature in the exercise of the taxing power has authority to determine by the statute imposing the tax, what lands may be and are in fact benefited by the improvement; and if it does so, its determination is conclusive upon the owners and the courts, and cannot is wholly unwarranted and a flagrant abuse, and by be assailed under the Fourteenth Amendment unless it reason of its arbitrary character is mere confiscation of the particular property.

Here the evidence showed that the District lands would benefit by reason of their proximity to the tunnel. He continued:

> The legislature declared that there will be such special benefits. The trial court, familiar with local conditions, after hearing evidence on this question, found that there would be such special benefits and sustained the legislative classification; and the Supreme Court of the State has affirmed its action. To the extent that there may be inequalities in the benefits received by the several parcels of land within the District, they are to be apportioned by the Commission in the manner provided by the Act, with a right of appeal to the local courts for the correction of errors in such apportionments.

Finally, it was urged that the Commission had arbitrarily adopted an *ad valorem* basis of appraisal without reference to actual benefits. The learned Justice pointed out that this *ad valorem* appraisal was only tentative and that these landowners had not availed themselves of their opportunity to have it modified. He said:

> Presumably if the tentative appraisal was made on an erroneous basis it would have been modified upon a proper showing. Having failed to object to the tentative ad valorem basis adopted by the Commission or to appear before it for the purpose of obtaining modifications or corrections as to their lands before the final adoption of such basis, they have here no sufficient ground of complaint. Where a city charter gives property owners an opportunity to be heard before a board respecting the justice and validity of local assessments for proposed public improvements and empowers the board to determine such complaints before the assessments are made, parties who do not avail themselves of such opportunity cannot be heard to complain of such assessments as unconstitutional.

The case was argued by Messrs. Edwin H. Park and Barnwell S. Stuart for the landowners, and by Mr. Norton Montgomery for the Improvement District.

Local Improvements,—Special Taxation, Discrimination

Laying 57 per cent of a special tax for one year for the construction of a drainage system upon railroads only indirectly benefited, while the other 1,200 acres of land assessed received a great and immediate benefit, is invalid for discrimination.

Thomas v. *Kansas City Southern Ry.*, Adv. Ops. 475, Sup. Ct. Rep. 440.

By special act the legislative of Arkansas established a drainage district, authorized the construction of drainage works, and empowered a drainage board to levy an annual tax upon the land and the railroad tracks within the district, not to exceed six per cent of the assessed valuation. For the year 1918 the board assessed a tax of $7,346.12. Of this, 57 per cent was levied upon the railroads and 43 per cent upon the 12,000 acres of land within the district. The land was not under cultivation, but would become much more valuable immediately upon being drained. The railroads, being constructed upon a fill above flood level, would receive no direct benefit. Claiming that these facts amounted to an arbitrary discrimination which denied them the equal protection of the laws, the railroads brought suit to restrain enforcement of the tax. A decree for plaintiffs was affirmed by the Circuit Court of Appeals for the Eighth Circuit, and on appeal again by the Supreme Court.

Mr. Justice Brandeis delivered the opinion of the Court. He said in part:

> The tax imposes upon the railroad, which can receive no direct or immediate benefit, a very heavy burden; and the lands which will receive a large direct (and possibly immediate) benefit, are required to bear only a very small part of the burden. The market value of the 12,000 acres may increased largely before any additional land is cultivated, or even before the improvement is made. The railroad can derive the indirect benefit, through increased traffic, only after the drainage of the wild lands has been effected and the reclaimed lands are being cultivated. The work of reclamation had not even begun. Obviously there could not be any increase in traffic receipts during the year 1918, in which the tax is laid. Appellants argue that the assessed valuation of the lands would probably be greatly raised in later years; that the assessment upon the railroad property would probably not be raised; that the proportion of the annual burden imposed upon the railroad would diminish from year to year; and that, in course of time, the aggregate of the taxes levied upon each piece of property would be thus adjusted so as to correspond to the benefits received. This argument is relied upon to save the scheme of apportionment. But it rests wholly upon prophecy. The fact is that the tax levied is grossly discriminatory. The best that can be said of the scheme of taxation (so far as it concerns the railroad) is that the burdens imposed will grow less, as its ability to bear them grows greater.

The case was argued by Messrs. James D. Head and Otis Wingo for the district authorities and by Messrs. A. W. Moore and James B. McDonough for the railroads.

Rhode Island Jurist Honored

Judge Arthur P. Sumner, Providence, R. I., has been elected president-general of the Sons of the American Revolution defeating Marvin H. Lewis of Louisville, Ky.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and in Neighboring Fields and to Brief Mention of the Interesting and Significant Contributions Appearing in Current Legal Periodicals

I. Among Recent Books

NEW TRIALS AND APPEALS. By Edwin Baylies. Third edition by Arthur F. Curtis. New York: Matthew Bender & Co., 1923. pp. xli, 1039. The third edition of this standard work on New York Practice in connection with new trials and appeals became necessary not only because of the passage of the Civil Practice Act which took effect on October 1st, 1921, but also by the numerous changes in procedure relating to appeals generally which had been made since the second edition was published in 1900.

While the general scheme remains the same as in former editions, the editor has wisely made a number of changes in form with respect to foot notes and the arrangement of the material which bring the work more in line with present day conditions.

Insofar as the general subject matter is concerned, there is very little left to be desired. The field is thoroughly and exhaustively covered in all its aspects and a glance at the table of contents will indicate that the arrangement is not only logical, but extremely convenient. Thus, after three chapters relating to the general subject of appeals, what constitutes reversible error, and the necessity of proper steps at the trial to save questions for review, there follow two admirable chapters on the jurisdiction of the Court of Appeals and the jurisdiction of the Appellate Division of the Supreme Court respectively, the minutiae of practice being separately considered in a subsequent portion of the book. To one rather familiar with the many questions of detail which so constantly arise in connection with appeals to the various Appellate Courts in the State of New York, it is refreshing to read a book in which the subject is discussed with such precision and accuracy. The foot notes are rather complete and appear to contain not only the older cases on the various points of jurisdiction and practice, but all of the very recent ones as well. On the whole, in view of the fact that Appellate practice of every name, nature and description in the State of New York is fully treated, including appeals from inferior courts and motions for new trials, it is surprising that the book is not much larger than it is. It is safe to say that it is one of the most useful, comprehensive and thoroughly accurate law books which has been published in some time on the subject of procedure and practice.

There are, however, some features of the book which could be decidedly improved. The appendix of forms, while quite complete with respect to the more common and elementary forms, could easily have been made more useful by including forms relating to applications to the Appellate Division for the certification of questions to the Court of Appeals, forms of orders to show cause to be submitted to the Appellate Division in connection with applications for permission to appeal to the Court of Appeals or to certify questions to the Court of Appeals, containing extensions of time to plead or temporary stays; and many of the forms relating to justification of sureties and exceptions to sureties, in connection with appeal bonds might possibly be omitted in view of the almost universal practice of submitting surety company bonds. Certainly, in view of the fact that the Court of Appeals has for the first time caught up with its calendar, the general question of applications for permission to appeal from the Appellate Division of the Supreme Court to the Court of Appeals, and applications for certification of questions of law to the Court of Appeals is bound to be one of great practical importance in the immediate future, and would seem to justify the most complete set of forms on the subject that could be devised.

Another distinct improvement which would not greatly increase the size of the book would be the inclusion of a table of cases. Experience has demonstrated the practicability and usefulness of such a table and it is hoped that as time goes on the practice of including a table of cases will become much more extensive than it is at the present time. Such a table is particularly necessary in connection with a treatise on practice and procedure where attorneys frequently recall the name of a case on a particular proposition and could quickly refer to the table of cases and thus locate not merely the citation of the case but the portion of the treatise in which the general subject is discussed.

Finally, the index is old fashioned and not at all in keeping with the rest of this very useful volume. The descriptive word method does not appear to have been used at all and the utterly useless and futile method is pursued of grouping forty or fifty different sub-headings under a single general phrase. Thus, for instance, there are 266 sub-headings in the index under the phrase "Appellate Division." The result, of course, is that it is just about as easy to find a point by running through the chapter headings of the table of contents, as it is to look for it in the index.

Removal of causes from State to Federal Courts, by James Hamilton Lewis. New York: Clark, Boardman & Company, Ltd. 1923, pp. 679.—The unfortunate complexity of many of the questions relating to the removal of causes and the somewhat extraordinary diversity of opinion upon many points by the various United States Circuit Courts of Appeals, make any studious effort to prepare a real treatise on this subject very welcome to lawyers, and indeed to the judges themselves. The interesting and scholarly introduction by Elijah N. Zoline very forcefully refers to the conflicting authorities on the subject and gives one the impression that this work of Senator Lewis is replete with absorbing discussion of the most important points upon which conflicts of authority exist, together with suggestions here and there as to how the situation might be met by new legislation on the subject. It is furthermore stated in the preface that

the book is a real treatise and "not a mere digest." After this frank recognition in the introduction and preface of what are perhaps the most vital weaknesses of the modern law book, it is quite disappointing to find that in the general treatment of the subject this work follows the orthodox and rather stereotyped form of present day text book. Here and there, as for example, in connection with the now well known and much discussed cases of ex parte Wisner, (203 U. S. 449) and ex parte Moore (209 U. S. 490), the theoretical discussion is complete and admirably done. Some phases of the subject of diversity of citizenship, which is probably the best chapter in the book, are also quite fully discussed from the standpoint of pure legal theory. On the whole, however, the book seems to have been prepared more for the purpose of classifying and indexing the statute and case law on the subject.

From the view point of the busy lawyer, anxious to find the law on a particular subject as quickly as possible and with as little expenditure of effort as may be, this book will come up to every expectation. The chapters and subheadings are very carefully worked out and the general scheme is probably the best to be found in any book on the subject. The treatment is thorough and scholarly and all the cases on the various points collected with great care. The usefulness of the book is greatly enhanced by a table of cases and an index, which, while perhaps not as complete as possible, certainly measures up to the demand for the use of descriptive words, as well as the ordinary and more usual legal phrases and headings under which the more experienced are likely to look in connection with a given branch of the subject.

More than the usual proportion of space is devoted to the practice, which is set forth in considerable detail in connection with the various grounds of removal, and particularly in connection with the numerous statutes bearing upon special phases of the subject not found in the Federal Judicial Code; and the appendix of forms which occupies 83 pages of the book is very well selected, with numerous references to the cases from which the forms have been taken.

The reprinting of the various Removal Acts, also in the appendix, and the repeated quotation throughout portions of the text of many sections of the Federal Judicial Code and other statutes is quite helpful, and probably necessary, in view of the manner in which the various statutory material is spread about and not easily accessible. It is curious that after all these years no one has found it worth while to publish in book or pamphlet form a complete reprint of all the statutes bearing upon Federal Jurisdiction and Procedure, including the various Removal Acts and the various Judiciary Acts.

On the whole, Senator Lewis' Removal of Causes should be very well received and fills a real need. The industry and care with which the book has been prepared are not the least of its many merits.

HAROLD R. MEDINA.

II. Current Law Journals

THE closing of the various Law Schools for the summer, suspends the publication of most of the law Reviews published by them and materially lessens the volume of current legal literature. However, many excellent and interesting articles are included in the various law journals issued during the last month.

Virginia Law Register for July presents an interview with Milton Carlson, of Los Angeles, a handwriting and finger-print expert, which deals with *"Dangers of Finger-print Identification."*

Every lawyer will get a keener sense of appreciation of the profession and of his duties and obligations as a member thereof, from a reading of an address delivered in 1886 by Hon. Waitman T. Willey, first United States Senator from West Virginia, published in West Virginia Law Quarterly for June. The address is entitled *"Ethics of the Bar."* The same journal reprints the address by Judge Cuthbert W. Pound, delivered before the Association of America Law Schools, upon *"The Law School Curriculum as Seen by the Bench and Bar."* The address was published in Cornell Law Quarterly for February, and attention was called to it in this review at that time. The article, while directed primarily to law teachers, will be read with profit by the profession generally.

Oregon Law Review for June published the address before the Oregon Bar Association by its president, Charles Henry Carey. The address argues strongly for the Permanent Court of International Justice, and calls upon American lawyers "to rise above political party, and to cast aside political expediency, and to register at once and most emphatically their approval of the general plan of the World Court."

In *"Federal Departmental Practice,"* which appears in St. Louis Law Review for June, Hon. Charles Nagel justifies the growing tendency "to lodge in the executive branch delegated authority from the other two branches," and makes helpful suggestions for the proper functioning of the various departments created. He argues convincingly for the decentralization of Federal Administration.

The June issue of the Congressional Digest is devoted to *"The Supreme Court of the United States."* Various phases of the history of the Court, its relations to Congress and the Executive, and its procedure and work are discussed in extracts from authoritative sources, and of unusual interest are the discussions by members of Congress, Governors, lawyers and citizens both in favor of and against the various proposals to "curb the powers" of the Supreme Court. Seldom has there been gathered together in such convenient form authoritative information and argument to enable the public to form its opinion upon a question of such vital interest.

Central Law Journal for July 5th prints a paper by Judge W. F. Jenkins, Georgia Court of Appeals, upon *"Technicalities of the Law."* The paper is written in a most entertaining manner, and contains many thoughtful and discriminating observations upon the subject discussed.

Harry C. Weeks, Wichita Falls, Texas, contributes a very helpful analysis and discussion of the cases arising under the earlier Revenue Acts, from which "some distinguished factors can be pointed out, which might assist in the interpretation of the present act." The article is entitled *"Taxable Income from Corporate Dividends and Reorganizations,"* and appears in Texas Law Review for June.

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THE COMMON LAW IN A TRANSITIONAL ERA

Recognition by Legal Profession of Character of Present Era Indispensable if Meaning or Philosophy of Transformations in the Law Is to Be Grasped and if Progress Towards Improvement of Human Relationships Through Law Is to Be Aided

By E. F. ALBERTSWORTH
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THE world today is in the midst of a renaissance compared with which that of the fifteenth and sixteenth centuries, however far-reaching it was, was only the beginning. The Protestant Revolution and the wars of religion checked the earlier movement, and control of external environment and improvement of human relationships through law.[1] In the present, however, both these objects are being undertaken, and so stupendous and revolutionary is the resulting new birth that contrasted with by-gone generations, it is at times difficult to recognize the new creature.[2] We still live too near that which is transpiring to be able adequately to describe it; oftener we sense that which is happening without being able coherently to formulate an interpretation or explanation.[3] Could our ancestors of the immediate past appear and observe the tremendous changes which have occurred in many fields of human endeavor and human thought, within the past one hundred years, they would have difficulty in believing that the interval had been so short.[4] In times past, the realm of philosophic thought has only gradually, if at all, affected the content of the law; today, on the contrary, this conservative social force has been compelled to recognize new and strange doctrines, and a great flood tide is upon us.[5] The problem is, what are these new elements in our civilization and how are they affecting the received law?

Currents in the Present Social Order

Approximately a hundred years ago the world was still practicing the modes of transportation and communication which the race had followed from the dawn of history. Shortly prior to this time in England, beginning about 1760, methods of manufacture creating the factory system, were completely changed, giving rise to great cities and to large scale production. Soon thereafter the railway and steamboat developed, then the telephone, the telegraph and the wireless, completely revolutionizing means of communication and drawing the world closer together, annihilating space and time. Since that time industrialism has reigned supreme, giving to the race both inestimable blessings and incalculable woes.[6]

Hand in hand with this complete change of the activities of men went the far-reaching discoveries and applications in physical and biological science, occasioning in many fields an entire recasting of beliefs and dogmas. The principle of mechanical causation and the uniformity of natural law gradually became universally held doctrines, leading to controversy between adherents of inherited views of the universe and man, based upon biblical deductions, and the exponents of the more modern views, grounded upon empiricism and scientific investigation.[7]

From both industrialism and the scientific movement, there developed a critical attitude or rationalism which has undermined many of the old faiths and shibboleths of the past.[8] For with the enormous growth in wealth, social classes arose based upon industrial achievement rather than family pedigree, and the former successfully challenged the leadership and authority of the latter. If Kant could denominate the Eighteenth Century the Aufklärung or Enlightenment, because rational speculation had destroyed many of the traditions and intellectual bondages of the past, what could be said of the nineteenth and present centuries? And if Von Hutten and Erasmus could proclaim the joyousness of the new birth in the sixteenth century, in that it removed from men the shackles of the past and gave them a new freedom in thought and action, what was this compared with the present generation?[9]

From the rationalistic movement and the intellectual ferment which developed, there arose the next great force or factor which made for change and overthrow of many inherited creeds and practices—the breakdown of authority. This movement is inchoate in the eighteenth century, but because of lack of scientific facts, either from scientists or archaeologists and historians, the efforts of the rationalists did not become consummate until the nineteenth and twentieth centuries.[10] Most of the cherished authorities or social sanctions of the past have come under the withering skepticism of this revolt against authority; and, when this movement has united with an evolutionary hypothesis, which tacitly assumed that the twentieth century was wiser than past generations, the combination has been of tremendous influence in our thinking and practice. Whether the masses or common people have much understanding of the merits of these great critical movements, is not material; the thinking itself is sufficiently pervasive to have penetrated all classes of society and become the intellectual heritage of large numbers of people in all walks of life. It is the prevailing Weltanschauung or world-view; it colors our

1. McGiffert, The Rise of Modern Religious Ideas, p. 11.
2. The religious spirit, taking its justification from biblical prophecy, saw in the remarkable outburst of knowledge in the fifteenth and sixteenth century the manifestation of a divine purpose. That same religious mind today interprets present-day changes as prophetic fulfillments. For both movements, see Case, The Millennial Hope, ch. 4.
3. Maitland, writing a decade ago, attempted to evaluate the effects of the fifteenth and sixteenth century renaissance upon English law. I Essays on Anglo-American Legal History, 155. But even at this distance he could make mistakes. See Zane, Renaissance Lawyers, 10 Illinois L. Rev., 542.
4. A century ago the law was likewise in a transitional era. Centennial History of the Harvard Law School, ch. 7.
5. Cardozo, A Ministry of Justice, 35 Harv. L. Rev., 113, 126.
6. Gladden, Ruling Ideas of the Present Age, ch. 4. The admirable treatise by the late Dr. Rauschenbusch, Christianity and the Social Crisis, should be read by every would-be student of social conditions and social reformer.
7. Perry, Present Philosophical Tendencies, ch. 2; also Shailer Mathews, The Church and the Changing Order, ch. 1.
8. The Function of Religion in Man's Struggle for Existence, chs. 1 and 2.
9. Hulme, The Reformation, ch. 6; also Vedder, The German Reformation, Preface. The present era with its attempt to introduce new ideas into the law is comparable to the time of the Jus Naturale in Roman days, when a similar movement was taking place. Roscoe Pound, Social Justice and Legal Justice, 75 Central Law Journal, 455.
10. Osborn, From the Greeks to Darwin, ch. 1; Bryant, A History of Astronomy, ch. 3; W. N. Rice, Christian Faith in an Age of Science, ch. 3; Windelband, A History of Philosophy (trans. by Tufts), 348-681.

thinking; it motivates our conduct; it has had its effects upon the law.

Two other movements in the present are closely allied and are perhaps fundamentally the same, namely, the social movement and the disappearance of individualism. Group activity is today the unit of organization instead of the individual. Powerful combinations or groups face one another, each seeking to secure the most out of the struggle for existence; the individual alone has in the majority of instances small chance of succeeding in this struggle. The larger the group the more efficacious the achievements, and also the gradual submergence of the individual. Individuals of strong personality, independent action, original ideas are in the minority; on the other hand, vacillation and indecision, hesitancy, imitative thought—these are the qualities of the larger number of individuals, due to their dependence upon the will of powerful groups.

Changes Wrought by Industrialism

The social order today lies within the grip of industrialism; the pursuit of wealth, with its concomitants of power and influence, has become for a majority of individuals the highest good or *summum bonum*. The great object of life is frankly a materialistic hedonism, wherein the strong and intelligent survive and dominate the weak or economically dependent and ignorant.[11] The effect upon legal doctrines and institutions has been profound and far-reaching, and is not yet completed, while at the same time new conceptions in juristic thought have arisen to justify that which is occurring. The history of law reveals the fact that a legal apologetic is usually at hand to bolster up, on a philosophical basis, that which the dominant group desires, or that which the social mind itself is seeking to realize.

The immediate as distinguished from the indirect effects of industrialism upon the law are not difficult of demonstration; archaic or inherited legal doctrines and institutions cannot survive before the onward march of a triumphant civilization, securing increasingly greater control over and mastery of physical environment. Revolutionary changes in court procedure and organization of courts, in order to furnish speedy justice for a hurrying industrial people, have occurred within the past eighty years; and the movement to bring business or specialized methods into these fields has not yet spent itself. [12] Where inertia has been too great or conservatism too strongly entrenched, parties themselves have provided for arbitration before expert tribunals, instead of appealing to the courts, and have made arrangements for their own rules of evidence instead of adhering to obsolete inherited rules in these fields.[13] A growing body of industrial jurisprudence, as it has been termed, appears to be springing up in the decisions of arbitration boards created by contract between employers and employees. An increasing number of large-scale industries have now provided these intra-industrial courts, whose impartial chairmen render decisions on questions covering all phases of the contract made between the unions and employers' associations.[14] Perhaps it is not too much to say that in these industrial courts, together with the enormous number of opinions rendered by workmen's compensation boards, minimum wage commissions, and other labor boards, a body of rules and standards is growing up, analogous to the genesis of the Law Merchant, which in future years will crystallize and perhaps be taken over bodily by the legal order itself. It has been largely because industrial progress has exceeded institutional progress that extra-judicial solution of controversies has been undertaken.[15] A similar development of an entirely new body of administrative law is likewise growing up, through the functioning of a vast number of commissions made up of laymen and administering justice without observance of court methods or court law.[16] We are also experimenting with anti-strike laws, forbiding concerted cessation of work in vital industries, and what the results eventually may be can only be conjectured.[17] Gone in many fields are the old doctrines of the fellow-servant rule, assumption of risk, and contributory negligence, while on the other hand, doctrines of practically absolute liability on the employer have been substituted. Freedom of contract in many directions has disappeared in the interests of what has been believed to be the social good, and at times it would almost appear as if the race were going back to medieval times in its ever-widening governmental paternalism. The category of a status has been extended to control groups and combinations, in order to prohibit the absolute user of property or exercise of one's absolute rights, which to our forefathers of the common law were regarded as indispensable to life and liberty themselves.[18]

The demands of industrialism are likewise to be seen in the rise of home rule government for large cities with but little control by the legislature itself, so that it would seem in time we shall have an *imperium in imperio* or separate part-sovereign political entities developing out of cities, having equal power to, if not greater than, that of the State itself. At the same time we observe the extension of municipal activities into all kinds of industrial undertakings which would have shocked the common law fathers, and which is still apparently distasteful to some courts.[19] Congestion of population in large industrial centers has made necessary new legal doctrines and institutions to enable the cities to secure and maintain a maximum of welfare and efficiency in the struggle for existence. So we have city planning and zoning schemes, municipal ownership of public utilities, regulation of prices, advancement of municipal recreation, promotion of commerce and industry; while to adjudicate on the validity of these extensions of the received law, courts struggle with out-worn canons of interpretation of the nature of a municipal corporation or express and incidental powers—all of which are clearly inadequate in dealing with the new situations. What is needed is an entirely new premise from which to reason, if these beneficial undertakings are to be fostered; and that slowly we are

11. Robinson, The Mind in the Making, Part III.
12. For a summary, reference is made to my article, Leading Developments in Procedural Reform, 7 Cornell Law Quarterly, 310.
13. Wigmore, Self-Imposed Rules of Evidence, 16 Illinois L. Rev., 95; Ross, Evidence before Commissions, 36 Harvard L. Rev., 391.
14. Ernst Development of Industrial Jurisprudence, 21 Columbia L. Rev., 155; Hale, Law-making by Unofficial Minorities, 20 Col. L. Rev., 451. Professor Tufts' experience as chairman of the Board of Arbitration for two leading clothing industries, is narrated in Judicial Law-making Exemplified in Industrial Arbitration, 21 Columbia L. Rev., 405.
15. "It is as though we were to give our courts the Zulu Code and ask them to apply it to the adjustment of American domestic and business problems." Newton D. Baker, Labor Relations and the Law, 8 Amer. Bar Assn. Journ., 731, 733.
16. See my article, Judicial Review of Administrative Action, 35 Harvard L. Rev., 127; Pound, The Revival of Personal Government, Proc. N. H. Bar Assn. (1917), 13.
17. Vance, The Kansas Court of Industrial Relations, 30 Yale L. Journ., 456; Humble, The Court of Industrial Relations in Kansas, 19 Mich. L. Rev., 675.
18. I have pointed out modern instances of this movement in "From Contract to Status," 8 Amer. Bar Assn. Journ., 17; for a fuller discussion from the standpoint both of the Roman and Common law, reference is made to Pound, The End of Law as Developed in Juristic Thought, 30 Harvard L. Rev., 211 et seq.
19. For an excellent treatment in a brief compass of this present movement in municipal corporation law, reference may be made to McBain, American City Progress and the Law (1918), Columbia University Press.

working out doctrines in this transitional period is indeed gratifying.[20]

Moreover, because of the necessities of industrialism, and because of the further fact that the world is today much smaller than ever before, owing to the stupendous changes in transportation and communication, we note a growing tendency to fraternize internationally, either in the convening of important international conventions on labor and its various problems, or in the formation of a permanent international court of justice. In the latter field particularly, there is likely to develop a definite body of procedents and case law, based upon rational adjudication rather than merely upon compromise or arbitration; and this body of law will presumably more and more be recognized by courts in the various political sovereignties.[21] Perhaps it is yet too premature to advance an opinion with reference to the probable changes which will occur in international practices, particularly in time of war, the necessity for which arose out of the Great War; but certainly in the tentative steps already taken, we observe fundamentally new conceptions and legal doctrines based upon the scientific progress which the race has made.[22]

In American jurisdictions within recent years we observe a transitional development in the law of trade regulation or anti-trust movements. With the avowed object of encouraging large-scale production in order to obtain certain economies, and perhaps to stabilize prices, the present outlook of courts as well as leaders of judicial opinion favors greater freedom in combination of competing units in the industrial field. It is being slowly recognized that the old shibboleth of absolute freedom of competition is impossible of attainment and perhaps not after all desirable; the old view was based upon an economic philosophy of *laissez faire* and economic determinism, that inexorable laws were present in the industrial field which would, if left alone, serve through competition to give to the race a maximum of benefits; the new viewpoint eschews such a mechanical treatment of the cases, believing that mere size or even capacity to do harm, should no longer be the criterion of illegality. The inquiry must be whether or not in fact there have been unfair practices which on a weighing of social interests should be condemned rather than sanctioned. Industrialism is such a vast system that only by encouraging the formation of gigantic combinations can a maximum of efficiency of production and service be attained.[23]

The Rationalistic Movement

The rationalism or general questioning of doctrines and institutions of the eighteenth century was transmitted to the nineteenth and twentieth, but accentuated in later times by its wider and more effective application in the sciences. The doubt principle of Descartes became the exclusive method first in science, in that it called for empiricism or study and research if nature was to be understood and controlled; then the method came over into the law itself, in the study of legal origins and in ascertaining how far the law met the needs of the social order. It spread also to the study of religion and its literary documents, giving rise to the Historical School of Religion, with a consequent dissipation of many alleged outworn beliefs and dogmas, engendering in many directions crises in the lives of individuals which adversely affected the church itself; but likely eventually much good will result from this conflict.[24]

The effect of this general attitude upon the law has been very marked in several directions. The received notion of the sanction behind law has been challenged. Instead of regarding the law with which one is familiar as a product of natural reason, or as a rule of conduct similar to physical laws, or as a command from a superior to an inferior, critics today maintain the law is exclusively none of these definitions, but that it rests ultimately in the fact of social-psychological guarantee, or in the acquiescence of the majority of individuals. Still opposed to this view is that of courts and a large number of lawyers that law is natural reason and that its content has a residual minimum which cannot be altered by the law-making powers, whether legislatures or courts, and that eventually law must conform to certain supposedly innate conceptions of right and justice. Which viewpoint will ultimately prevail in this transitional period can now only be conjectured; perhaps both will continue to exist a very long time.[25]

In the rise of administrative tribunals, the old doctrine of a separation of powers of government while still given lip service, has as a matter of fact been definitely set aside by many courts.[26] The whole doctrine has been placed upon the ground of convenience instead of upon some preconceived, a priori view as to the nature of government.

The doctrine of consideration in contracts is being called in question as unworkable today; the real question should be whether or not there has been a declaration of will to enter into a legal transaction, and detriment to the promisee or benefit to the promisor are at most only evidentiary criteria of that intention.[27] Also in the field of contracts, the old subjective test for mutual assent in the formation of contracts has slowly disappeared before an objective one.[28]

Many jurisdictions have abolished entirely the distinction between transitory and local actions, foisted upon the law in America by Chief Justice Marshall—although in England in earlier times the distinction was of course well known—and the present tendency is to revert to Lord Mansfield's distinction between actions in rem and in personam.[29] To the lawyer whose legal world came to an end with Blackstone, this movement is of course an innovation and perhaps to him undesirable.

An increasing number of jurisdictions are permitting tort actions between husband and wife wherever personal injuries have been sustained, even though express statutory sanction is wanting.[30] In reaching this result the courts have in some instances said that a personal

20. Professor Beale criticises the old doctrine, advanced by Chief Justice Shaw of Massachusetts, that a municipal corporation has only those powers expressly given or incidental to its nature, by affirming that a city ought to be allowed to do anything which a private individual might do unless restrained by law. See book review of McBain, supra, 32 Harvard L. Rev., 90, 91.

21. Hudson, The Permanent Court of International Justice, 35 Harvard Law Review, 245.

22. Hyde, International Law, especially chapters on Blockade, Contraband, and Continuous Voyages. Reference is also made to the Declaration of Washington in Relation to the Use of Submarines and Noxious Gases in Warfare (Senate Document, No. 126, 67th Congress, 2d session, p. 886.

23. The changed attitude is reflected in the Transportation Act of 1920 as well as some recent judicial decisions. See Watkins, The Change in Trust Policy, 35 Harvard Law Rev., 815, 926.

24. For an interesting sketch of this movement, reference is made to McGiffert, Rise of Modern Religious Ideas, ch. 5.

25. Pound, The Philosophy of Law in America, 7 Archiv für Rechts- und Wirthschaftsphilosophie, 213.

26. Fairlie, Administrative Legislation, 18 Michigan L. Rev., 181.

27. Pound, Introduction to the Philosophy of Law, p. 276; Ashley, The Doctrine of Consideration, 26 Harvard L. Rev., 429.

28. Williston, Mutual Assent in the Formation of Contracts, 14 Illinois L. Rev., 85.

29. Storke, Venue of Actions to Land, 27 W. Va. Law Quarterly, 301.

30. I have elsewhere summarized some of these recent tendencies, in the law of torts. See "Recognition of New Interests in the Law of Torts, 10 California Law Rev., 461; also note, 21 Michigan Law Rev., 473.

injury tort inflicted on the wife by the husband is a chose in action and therefore property, on which suit might be allowed where statutory authority is given to prosecute suits for property rights; or other courts have held that authority to prosecute property suits indicated a legislative intention to break down entirely the old doctrine of exemption of the husband from suit, and that the greater right—injury to the person—ought to be protected if the lesser right, damage to her property, was protected. All this reasoning, where express authority to sue is wanting, represents the general questioning of the rationalism so much in vogue today.

An entire recasting of the purpose of the legal order is being agitated today by some juristic writers and thinkers, which would seem in some respects diametrically opposed to the inherited conceptions. Where the forefathers stressed liberty in all spheres of action as the object of the legal order, present-day critics would place a satisfaction of a maximum of human wants, alleging that abstract liberty without a minimum of subsistence is devoid of satisfaction or justice. Legal rules and doctrines are to give way before the improvement of the lot of mankind, either in securing a better adaptation among human beings or a larger control over nature with a consequent increasing satisfaction of human wants. The law is merely a means to an end according to this conception, and not an end in itself, as appears to be the view of some.[31]

The Revolt Against Authority

This movement in our present civilization is of course closely allied to the rationalism already discussed, and perhaps in strict analysis the two cannot be separated; but so far as it has been a revolt by legal methods through rationalistic criticism, a distinction can be taken. It is not the intention here to discuss the revolt against constituted authority of law and government, but rather the revolt on the part of lawyers and judges to ancient precedents and modes of reasoning inherited from by-gone generations of lawyers and judges. The general atmosphere of revolt to outworn ideas and institutions has affected the law and thinking about the law.

Our whole doctrine of *stare decisis* or judicial precedents has been challenged by some, courts as well as other juristic thinkers and writers. This school, called by continental writers *Freie Rechtsfindung,* or freedom of decisions, would examine every case on its merits even though a precedent controlled the court's decision, and hold that at the most a precedent should have only persuasive and not compelling weight.[32] Its adherents, when confronted by the objection that this would introduce into the law the personal equation of the court, reply that coutrs have already been practicing this method for long time, but covering up the process through spurious interpretation or through a feigned "differentiation" of the cases in attempting to distinguish the indistinguishable.[33] Whatever the merits of this viewpoint in the law at present, it is undoubtedly true that an increasing number of courts read into the law their own personal viewpoints and it is the open boast of some lawyers that in their practice a certain judge is almost sure to do this without paying much respect to precedents. Undoubtedly there are dangers in this practice in that it puts discretion of the court at large; at the same time it must not be overlooked that the conditions for which the law must function are changing, and that an attempt must be made to solve the problem of rule and discretion in such a way that both social interests of predicability and certainty, on the one hand, and the social interest in just decisions on the other hand, be reconciled.

Illustrative of this tendency to question the authority of decided cases is the action of the Supreme Court of Kansas in Thurston v. Fritz,[34] involving the question whether a dying declaration with respect to a civil matter, and not concerning the question of homicide, could be admitted in evidence. Following Dean Wigmore's criticism, the court answered this question in the affirmative, and allowed the evidence to be introduced.[35] So also the Supreme Court of the United States in the recent case of Terrall v. Burke Construction Co.,[36] reversed its prior holdings, drawing a distinction between antecedent agreements and subsequent action of states in excluding foreign corporations from removing their cases to the federal courts, the court saying such distinction could be no longer maintained. Often a changed personnel can account for decisions of this character; judges with different views ascending the bench after the older precedents have been handed down.[37] But oftener the real reason is that courts feel some modification should be made in the rigidity of the doctrine of precedents.[38]

The Scientific Movement

The tremendous increase in man's power over natural forces, as brought about by the use of scientific methods, has brought even to the common man a feeling of dissatisfaction with a legal system which has in many respects failed to keep abreast of scientific progress. It has been believed that efficacy of effort and intelligent study of social conditions would bring changes in the law which are indispensable if the law is to further civilization instead of retarding it. Happily leaders in juristic thought within the past decade have gradually awakened to a realization of the problem of bringing to the aid of the law, both the knowledge gained from science as well as the methods which it employs. In criminal law and procedure we note in recent years a growing movement to eradicate from these branches of the law obsolete methods of procedure as well as mechanical treatment of offenders and the imposition of penalties. Crime commissions have been organized to study into the problem of crime, criminal court organization, and prosecution of offenders; much of great value has been accomplished, although the viewpoint seems still prevalent that improvement of law and organization alone are self-sufficient, when personnel is equally so. In both civil and criminal law, statistics are given greater prominence, to ascertain how the law actually works out in experience, and increasing efforts are put forth to secure data which may be used toward this end. The older methods eschewed such scientific investigation, adopting rather the view that if a law was not enforced the difficulty was that the law was imperfect in that

31. This viewpoint is well stated by Mr. Justice Brandeis, before elevation to the bench, in "Living Law," 10 Illinois L. Rev., 461.

32. The movement is admirably described by Professor Haines in "Influences of Judges," 17 Illinois Law Rev., 96.

33. I have discussed this matter in "Imitative and Apocryphal Reasoning of Courts," 8 Cornell Law Quarterly, 205.

34. 91 Kansas, 468.

35. Evidence, sec. 1436. See also Humble, Departure from Precedent, 19 Michigan Law Rev., 608.

36. 41 Sup. Ct. Rep., 188.

37. The interval of twelve years between the decision of Lochner v. New York, 198 U. S. 45 (1905), and Bunting v. Oregon, 243 U. S. 426 (1917), during which time the personnel of the court greatly changed, may explain why the later case practically reverses the former without even mentioning it.

38. The movement is well discussed by Mr. Justice Cardozo, The Nature of the Judicial Process, ch. 5. Adherence to Precedent.

it did not represent natural reason or an innate conception of justice.

In the substantive field of the law we observe rise of new doctrines or modifications of inherited legal dogmas due to the progress of scientific knowledge. Perhaps the time is not far distant when compulsory vaccination will be everywhere enforced with no alternative of a fine for disobedience; and this may be imposed upon adults even if there should be no immediate danger of an epidemic.[40] Undoubtedly there is at present some judicial dissent from this position, particularly where there should be no imminent peril against which vaccination is believed to be a preventive; but the trend of medical practice and judicial support seems to be in this direction. Eugenic laws, even for one of the sexes only, seem to be in increasing vogue; asexualization and sterlization as a punishment for crime are upheld, with perhaps some difference of view where it is only to prevent procreation and to prevent defectives from propagating their kind.[41] It is pretty generally held today that religious scruples against the employment of medical skill in case of disease or accident will not preclude the imposition of legal liability upon a parent or one in *loco parentis*.[42] The law is still wavering whether or not recognition should be given to the rights of the unborn child—if so it may be designated—in case of personal torts inflicted upon it by persons other than its mother; practically all decisions in the Anglo-American legal world deny any relief, but that some more liberal viewpoint is likely to result with increasing knowledge is at least possible.[43] So in the field of the x-ray there are many problems arising which call for sound training on the part of the courts in scientific knowledge, and where perhaps present technical legal rules may be inadequate.[44] Admissibility of evidence has also its problems in the field of telephonic conversations;[45] the airplane likewise is causing a modification of the inherited legal view with reference to torts of trespass to realty.[46] In some of these fields perhaps old categories of the law will be sufficient, but in others there is likely to be some modification or creation of entirely new premises.

The Social Emphasis

As a by-product of the social currents already enumerated, and perhaps at the same time an efficient cause of these very movements, there is to be observed a tremendous and ever-dominant social movement, which on one side includes emphasis upon humanitarianism and on the other a belief that a reconstruction of human society is at once imperative and possible. In the middle ages the belief in the permanence of existing conditions was paramount; the chief concern of man was to prepare for the next world, not to improve the present. In fact, it was doubtful whether the present could be bettered; it was the result of a gigantic conflict between good and evil in which the evil was temporarily in control. When the renaissance of the sixteenth century swept away considerable of this pessimistic philosophy, and when the eighteenth century witnessed social upheavals on a gigantic scale, giving rise to powerful new social classes, we observe a decided change in thought, and then the idea becomes for the first time prevalent that the world was growing better and that man was gradually rising from a state of ignorance and barbarism to a position of indefinite perfectibility. It was now seen that until the race reached its ultimate goal, conditions in the world must be impermanent; dissatisfaction with the present and an intense desire to obtain social betterment became the outstanding objects of the social conscience. Coupled with this was the humanitarianism of the religious or ethical mind, which sought to bring about an equilibrium between the emphasis upon property and contract of the nineteenth century and the more recent insistence upon the welfare of the individual. Everywhere we observed an anti-private property movement in the sense of increasing restrictions placed upon the absolute user of it, in regulating prices and charges, in disposing of it, or in acquiring it. Along with this movement there went an equally strong emphasis upon restricting the liberty of the individual, in the expression of his opinions or exercising freely his powers of contract. Abstract liberty has been found to be undesirable and not the all-sufficient solvent of social ills which prior generations thought it to be; on the contrary, steady employment, a living wage, a larger sphere of individual and social development, are believed to be among the more desirable objects which the legal order should realize. Certainly, here individualism gradually disappears, and it may be the race is making progress by going backward and recreating old conceptions and legal dogmas. However this may be, the essential thought is that human beings are ends in themselves, for which the law should exist, and not, as the past believed, that human beings existed for the sake of the legal order.[47]

The recognition by the legal profession that our present era is a transitional one is indispensable if the meaning or philosophy of present transformations in the law is to be grasped. The individual who fails to understand the signs of the times in the legal order, or that court which refuses to sense the profundity of meaning behind the new views and legal doctrines which press for legal recognition, cannot be said to aid in the progress of the race in its triumphant and increasing control over the forces of nature and the improvement of human relationships through law.[48]

40. A. H. Throckmorton, Growth and Development of the Police Power, 20 Ohio Law Register, 635.
41. Brothers, Medical Jurisprudence, 269-272.
42. Note 30 Yale Law Journal, 748-753.
43. I have discussed this recent tendency in 10 California L. Rev., 461.
44. Wilson, The X-Ray in Court, 8 Cornell L. Quart, 202,334.
45. Note, 31 Harvard L. Rev., 794-796.
46. Note, 33 Harvard L. Rev., 569.
47. This social emphasis is well described by McGiffert, The Rise of Modern Religious Ideas, ch. 13.
48. Our stronger law schools are likewise concentrating on special phases of the transition elements in the law, with the object of restating the received law in such fashion that the new elements will be assimilated and made to serve the ever-enlarging needs of industry and the state.

What Every Citizen Needs

"What every citizen needs is a simple, and therefore clear, grasp of the American system of government, not as a dogma or fiat of inspiration, but as an evolution of human experience. Whether young or old, every voter should dwell long upon the critical days from 1781 to 1787, study the why, the where, and the when of the memorable convention that gave this great document to the world, note the mighty men who so well played their parts in that immortal drama of human freedom, and get their points of view. These impressions will never die out, but prove an inspiration throughout life. This work should begin before young people reach the high school, for half of them never get so far. And the dangerous ignorance of grown-ups should not be left undisturbed. No man appreciates what he does not understand, and Americans have much to appreciate."—Chicago Journal.

DEVELOPMENT OF THE INTERNATIONAL MIND

As Soon as Nations Accept Doctrine They Are Moral Persons and Bound to Conform Their Conduct to Moral Laws, the Basis is Laid for Recognition of Like Personality in Other Nations, and a True International Society Begins to Appear*

By Nicholas Murray Butler
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ONE who accustoms himself to look beneath the surface of human history, will find constantly at work there powerful and conflicting emotions and ideas. The happenings that one takes note of day by day are the result of these hidden and sometimes unsuspected causes. From the vast reservoir of the world's unconscious mental life, there flow those constant streams of tendency which produce the results that are visible to all men. Wars and migrations come and go, nations rise and fall, the center of gravity of human interest moves from one point to another far removed, and only those are mystified who seek the explanation solely on the surface of things. A deeper and more reflective examination of all that pertains to human life and conduct will often give the clue to an understanding of what is taking place.

From the break-up of the Roman Empire to the present day, a period of perhaps fifteen centuries, the most powerful moving force in the history of the Western World, although often unconsciously operating, has been the struggle for nationality, for national organization, for national independence, and for national expansion. The integration of separate states into empires and then the break-up of these empires themselves, have been due to this cause. Religious zeal, economic pressure, and the thirst for novelty have been contributing causes, sometimes powerfully so, but the persistent struggle for nationality has dominated all these.

During the eighteenth century the civilized world witnessed with sympathy and regret the suppression of the nationality of Poland, which had existed for a thousand years, and the forcible division of its territory among the governments of three peoples other than its own. During the nineteenth century the world witnessed with sympathy and indeed with enthusiasm, the steady expansion of the British Empire and the movement for the political unity of the Italian and the German states. Here were believed to be three powerful elements in the development of civilization and of enlightment, of advance in science, in letters, and in the arts, in the spread of commerce and of industry, and in the upholding of sound principles of personal and national conduct to guide the life of men and nations. Partly for reasons that were psychological, partly for reasons that were economic, the movement toward nationality eventually became one of distinct menace to the people of the world and to the safety and independence of the smaller nations themselves. Finally in 1914 the crash came, and the principle of nationality seemed for the moment to have exhausted its good elements and to have brought down the world in ruin about it. A huge combination of nations was effected for the protection of those things which they held dear, and at the conclusion of the military struggle an effort was made to bind the nations together in a league of common interest and common purpose. It was held, on the one hand, that nationalism as a ruling force had distinctly failed and that a broad and generous spirit of internationalism must henceforth take its place. On the other hand, it was asserted that any such hope was merely a dream, that it took no account of the actualities of human life and behavior, and that it lacked every element of practicality and helpful human service. This conflict of opinion, supported by a corresponding conflict of national and international policies, makes up the environment in which we are living at the moment. Nationalism has lost some part of its appeal to men, and faith in it as an end has been rudely shaken. Internationalism, on the other hand, certainly in its more extreme form, fails to commend itself to the judgment of many sagacious leaders of opinion, and its fate is hanging in the balance. If it be true that the struggle for nationalism which has ruled the history of the Western World for so long, has exhausted itself as a moving force, then we are truly standing at a cross-roads in the history of the world. If the road to nationalism be closed to farther progress, what road lies open to humanity?

It would be difficult to find any problem, either intellectual or practical, that presents itself more persistently or in more varied forms than that of the relation between the One and the Many. The ancient Greek philosophers saw its significance, and with that naive directness so characteristic of them, attacked it as a fundamental question that must be answered if the world was to be grasped by human intelligence. The problem of the One and the Many lies at the bottom of all logic, of all ethics, of all economics, and of all politics; it lies at the bottom of the problem of nationalism and internationalism. How can the One be enriched and perfected not only without harm to the Many, but so as to enrich and perfect the Many itself? How can the One be distinguished from the Many and given a form and a personality all its own? How can the One so guide and direct its own appetites and so shape its own conduct as to build up rather than to tear down the advantage and the welfare of the Many? Truly the relation between the One and the Many, if the oldest of intellectual problems, is also one of the most many-sided and most difficult.

It may be agreed that history and anthropology have demonstrated to us that nationality does not rest, certainly does not entirely rest, upon a basis of race. The history of Greece, of Rome, of Italy, of France, of Great Britain, and of the United States would appear to make that contention impossible. Doubtless in a true nation there is and must be a sufficient basis of ethnic unity, but that ethnic unity may itself, as in the case of Italy, of Great Britain and now of the United States, be the sum total of quite different elements. There must, in addition, be a sufficient measure of geographic unity; otherwise economic interests

*An address delivered before the Academy of International Law at the Hague, July 20, 1923.

alone will be sufficient to cause constant conflict and desire for expansion, even by violence, into the territory of a neighbor. Then to accompany this sufficient basis of ethnic unity and of geographic unity, there must be a governmental unity. The nation must organize itself as a state, and give expression thereby to its political consciousness, its political traditions, and its political ideals. Obviously, if each true nation is to follow this course, and if there be no ruling purpose but selfish aggrandizement, economic, territorial, or numerical, the several nations must be in constant conflict and constant international war must follow as a necessary result.

It may assist to propose a satisfactory answer to these difficult and perplexing questions, if we look upon a nation as endowed with personality like an individual. In that case, we gain some new comprehension of what is meant by national opinion other than the opinions of individuals, of what is meant by national feeling other than the feeling of individuals, and of what is meant by national ambition and purpose other than the ambition and purpose of individuals. Nothing is more certain than that there is a psychology of the crowd, and that, difficult as it may be to understand, a mass of men thinking, feeling, and acting under a common impulse, think, feel, and act in ways that as separate individuals they could not hope to imitate. If a nation be a person—and I think it is—then those tested principles of ethics which have application to the conduct of individual persons, would also have application to the conduct of national persons. The same fundamental precepts, the same ruling points of view, that we call moral in the case of an individual, are also moral in the case of a nation. This thesis finds powerful support in the teachings of Chancellor Kent who in his *Commentaries on American Law* wrote these words:

> States, or bodies politic, are to be considered as moral persons, having a public will, capable and free to do right and wrong, inasmuch as they are collections of individuals each of whom carries with him into the services of the community the same binding law of morality and religion which ought to control his conduct in private life.

There is no proper conflict between this doctrine and the theory of sovereignty. If a sovereign be defined as an individual or a group without a political superior, then we have only to have recourse to the principles of ethics to proclaim the fact that self-direction, self-control, self-discipline, must be operative in the case of a national person as they are in the case of an individual person, if that national person is to appear to itself and to others as truly moral. In other words, the path to an exalted and purified nationalism and the path to a reasonable and practical internationalism would appear to converge; just as it is not by the suppression but by the development of the capacity and resources of its individual members that the state itself is strengthened and enriched, so it is not by the limitation of the operation of the principle of nationality but rather by its development on a higher plane that the spirit of international cooperation and service will be increased and uplifted. The world has no need for weak, struggling, uncertain nations, but it offers place, power, and opportunity to strong, confident, and well-organized nations, that rule their conduct by moral principles and make no claim to override the world for their own selfish pride or aggrandizement. If the alternative be *Die Weltmacht oder Untergang*, the end is certain to be *Untergang*.

So soon as nations, both great and small, accept the doctrine that they are moral persons, and as such are bound to conform their conduct to moral laws, the basis is laid for the recognition of the like personality of other nations and a true society of nations begins to appear. Just as individuals are no longer granted either moral excellence or political rights by reason of their intellectual competence or their material possessions, so nations, when judged as moral persons, are not to be given weight as large or small, rich or poor. One test of membership in a true society of nations must be like the test of membership in a society of individuals; namely, willingness and capacity to observe loyally the principles and to follow earnestly the ideals which are characteristic of civilized states. A truly civilized nation, one which guides its practical policies by a moral purpose, will shape its own municipal laws with due regard to the laws and the customs of other nations whenever they are brought into contact through commerce or the movement of their citizens. Not a few policies which appear to be solely domestic have direct or indirect international application or reference.

The analogy between the individual and the nation may now, however, be pressed too far, since there is a true psychology of the crowd or mass, which is very different from the psychology of the individual man. The studies in this field, that have been carried on for a quarter century past, have opened new vistas of knowledge and understanding to those who would grasp the significance of nations and who would try to explain their groupings and their conflicts. The economic motive, while by no means always dominant, is everywhere important and occasionally controlling. History cannot be explained either solely by the economic motive or entirely without it. The psychology of the crowd or mass takes full account of this influence in human affairs, but assigns it a properly subordinate place in the intellectual, emotional, and moral life of nations.

A real difficulty is found, in the life of nations as in the life of individuals, in the ambition of the strong and powerful to grow yet stronger and more powerful, even if it be at the expense of a weaker and less fortunate though equally civilized neighbor. The smaller nation, like the weaker or poorer individual, cannot find protection in force. Law, and law alone, can give it the security it desires. Opinion, which, as Napoleon once said, controls everything, crystallizes into the forms of law and speaks through those forms for the guidance and regulation of those who submit themselves to the rule of law. Those who do not so submit themselves, be they individuals or nations, are the world's criminals, and the criminal we have always with us and shall have while human nature remains human.

The best is often the enemy of the good. To insist upon perfection of organization often means to oppose the only present steps that are practicable toward the improvement of relations between men and nations. Such progress as has already been made, is slow indeed when measured by the vision of prophets and the insight of philosophers. But yet it is considerable. It must be admitted, however, that to urge the rule of law over nations and to insist upon it, is quite hopeless unless the road to law be paved by instructed and enlightened public opinion. An international engagement or treaty may be admirable in form and correct in every legal detail, and yet under the pressure of national ambition, of national pride, or of national fear

it may become a scrap of paper, simply because there is not behind it that firm body of public opinion upon which alone enduring law can rest and by which alone obedience can be secured. Here again we come upon another phase of the problem of the One and the Many. If a nation, representative of the One, is so reckless of moral control as to seek only its selfish aggrandizement at whatever cost to the Many, it becomes and must become the enemy of the world's peace and order, precisely as an individual acting in similar fashion becomes the enemy of the peace and order of the community in which he lives. It is essential that the gospel of service should be hearkened to by nations as well as by individuals. It is the teaching of this gospel, that a nation exists not for self-aggrandizement but for the promotion of the general good, and that it may grow great and strong and rich without danger to mankind if its greatness, its strength, its wealth, and its riches be used in a spirit of friendship, not hostility, of service, not selfishness. To put it differently, it is essential that the civilized nations should develop, each one itself, what I ventured long since to describe as the international mind.

The international mind is that fixed habit of thought and action which looks upon the several nations of the civilized world as cooperating equals in promoting the progress of civilization, in developing commerce and industry, and in diffusing science and education throughout the world.

The international mind, so defined, is in sharp antagonism to that internationalism which would break down the boundaries of nations and merge all mankind, regardless of differences in tradition, in law, in language, in religion, and in government, into a single and common unit. Such internationalism, instead of being progressive, would be reactionary. It would obliterate those differences which the march of progress has developed, and it would seek to destroy those landmarks of civilization which have been set up at great cost of life and labor over twenty centuries. Such internationalism would foment discord by creating false relationships, which, having no body of facts to correspond to them, could only give rise to friction, to conflict, and to internal war. The international mind, on the other hand, makes much of the spirit, the temper, and the tradition of nationality. It builds upon history and upon achievement, and it appeals to the pride, the glory, and the spirit of service of the nations, both great and small. It sees in the various civilized nations so many different facets of a single crystal, each reflecting the light of civilization in its own way, and each being a necessary part of the complete and perfect stone.

It is quite idle to say that an association of nations based upon the international mind is a limitation on a nation's sovereignty or that it calls into existence a super-government. Just the contrary is true. What higher use can be made of a nation's sovereignty than to cooperate with other like-minded sovereign nations in the common task of advancing civilization and promoting the comforts, the satisfactions, and the happiness of men, in removing artificial barriers to trade and commerce, in spreading abroad the teachings of science, in making common property of the world's literature and the world's art, and in holding out the hand of helpfulness and courage to those less fortunate people who, backward in their social organization or in their philosophy of life, have not yet been able to take their place at the council board of nations? In that republican form of government which is rapidly becoming the most usual form of political organization, no man has the privilege of ruling any other man, but merely that of sharing with him the joint control over their common interests. So it would be with an association of internationally minded nations. No super-government would be called into existence to rule any nation, but there would be a cooperative effort to seek out, to advance, and to improve those matters of common concern, which for good or ill affect every nation alike. It is the old, old story. It is the problem of the One and the Many in a new and acute form. That which Pythagoras and Parmenides and Plato discussed in the simple language of early Greek philosophy, we are called upon to deal with under the complicated conditions of modern social, economic, and political life. Just as in the philosophy of the Greeks the One could not be got rid of, so in the political philosophy of this twentieth century the individual nation can not and must not have its sovereignty invaded or suppressed. Just as in the philosophy of the Greeks the One and the Many had to be explained, if at all, with reference to each other, so in our modern political philosophy the individual nation and an association of nations must be looked upon, not as antagonistic but as complementary, as parts of one complete organic whole. The method of achieving this end is the method of law. The pathway to that law is provided by morals. The support both of morals and of law is to be found in public opinion. That public opinion must be taught to know the international mind, to accept it, and to guide national action and policy in accordance with it.

'The Law of the Kinsmen"

"Not the least important part of the luminous work which Lord Shaw of Dunfermline has just given to the English world under this title is the Foreword to it written by ex-President Taft, Chief Justice of the United States. It will be welcome news to those who are concerned in bringing about the closer union of the Bars of the two countries that Mr. Taft expresses the confident hope that next year the Bar Associations of America and Canada will hold their annual meetings in London, the fountain head of the common law, 'and drink inspiration from old Westminster Hall, the Inns of Court, the Royal Law Courts, and the home of Bacon, Mansfield, and Blackstone.' The present visit of the Hon. James Beck, the Solicitor-General of the United States (whose stimulating address on the origin and functions of the Supreme Court of that country, reported in another column, will be read with keen interest by all our readers) will help, as did Lord Shaw's address on the other side last year, to further that project. And we cordially appreciate the Chief Justice's far-sighted, statesmanlike, view that this great assembly of the Bars of England and America 'will create a thousand enthusiastic missionaries to be distributed throughout the United States' to teach their everlasting debt to England for the common law and their institutions of civil liberty, and 'to spread the message of goodwill and kinship from the Old Home.'"—The Law Journal, June 30, 1923.

Legal Aid for Poor

"The interest shown by the National Bar Association in these matters will be reflected by state and city associations. There is no doubt that the American judicial system, admirable as it is, needs constant study with a view to improvement."—Ex.

CURRENT LEGISLATION

THE COMMERCIAL ARBITRATION LAW

By J. P. Chamberlain

AGREEMENTS to arbitrate disputes arising under contracts have been frequently used among business men both to secure a prompt settlement of difficulties impossible in the very crowded calendars of the courts and also to have the facts passed upon by experts instead of trusting to the uncertainties of the ordinary jury.[1] Important organizations in different lines of trade have instituted arbitration tribunals for their members, and have established what amount to codes of law governing the questions of quality, delivery and other customs of trade which govern the actions of the tribunals. The difficulty has been that there has been a means of escape to the ordinary law courts when a litigant thinks his chances would be better before a jury than before arbitrators in his own trade. The door to this means of escape has been kept open by the law so that even where the parties have submitted their dispute to arbitration, under the old common law rule their submission "cannot be specifically enforced and the parties may revoke it at any time."[2] Therefore, either one of the parties might after making the agreement to arbitrate withdraw his consent and there was no power in the court to compel him to carry out his contract. The other party might have an action for damages for a breach, but the social advantages of prompt settlement and of relieving the strain upon the courts was lost, and the parties could never be sure that their agreements would be carried out.

The courts have not felt able to change the common law and compel the parties to carry out their agreements, although they have not infrequently sharply criticised the rule. Judge Hough of the Federal District Court remarks: "It has never been denied that the hostility of English-speaking courts to arbitration contracts probably originated (as Lord Campbell said in Scott v. Avery, 4 H. L. Cas. 811)—'In the contests of the courts of ancient times for extension of jurisdiction—all of them being opposed to anything that would altogether deprive every one of them of jurisdiction.' A more unworthy genesis cannot be imagined. Since (at the latest) the time of Lord Kenyon, it has been customary to stand rather upon the antiquity of the rule than upon its excellence or reason." He adds: "It is certainly a singular view of judicial sanctity which reasons that, because the legislature has made a court, therefore everybody must go to the court," but concludes that although "inferior courts may fail to find convincing reasons for it" the rule must be obeyed.[3] Upholding an arbitration statute reversing the common law, Judge Cardozo of the New York Court of Appeals, answering the argument that to send the parties to the arbitration tribunal they had themselves set up was to oust the court of its constitutional jurisdiction, remarked: "The Supreme Court does not lose a power inherent in its very being when it loses power to give aid in the repudiation of a contract, concluded without fraud or error, whereby differences are to be settled without resort to litigation. For the right to nullify is substituted the duty to enforce.[4]

The courts in Pennsylvania had gone part of the way to meet the situation and had held that an agreement to arbitrate questions arising under a contract was enforceable if the contract itself set up the person who was to act as arbitrator, either by naming him or naming his office.[5] As was said in the leading Pennsylvania case upon this subject: "It is undoubtedly true, when the parties to an executory contract agree, that all questions of difference or dispute which may arise between them in reference thereto, or that the amount of any claim arising therefrom shall be first submitted to the arbitrament of a single individual, or tribunal named, they are bound by their contract, and cannot seek redress elsewhere, until the arbiter agreed upon has been discharged either by the rendition of an award, or otherwise. Monongahela Nav. Co. v. Fenlon, 4 W. & S., 205; Connor v. Simpson, 8 Out., 440; Hostetter v. City of Pittsburgh, 11 Out., 419. But it is equally true, that where the agreement in question does not provide for submitting matters in dispute to any particular person or tribunal named, but to one or more persons to be mutually chosen by the parties, it is revocable by either party; and such a provision is not adequate to oust the jurisdiction of the courts having cognizance of the subject-matter of the dispute: Gray v. Wilson, 4 Watts 41; Menz v. Armenia Fire Ins. Co., 29 P. F. S., 480; Hostetter v. City of Pittsburgh, supra." Such agreements, however, though valid in Pennsylvania were not valid or enforceable in New York where a contrary rule prevailed.[6]

The Legislatures have been hesitatingly coming to the rescue. Their first step in securing the enforcement of arbitration agreements was taken by permitting the parties to request the court to enter an order or take some action directing the arbitration to be proceeded with and if this was done the parties could not withdraw since the matter had been taken out of their hands and had become part of the court procedure which could be enforced as other orders of the court. California Code of Civil Procedure, Sec. 1281. A similar rule applied in New Jersey.[7]

The next step was to avoid preliminary action by the court and to make the agreement of the parties themselves enforceable. Such was the statute of Illinois passed in 1917.[8] The act permitted persons having requisite legal capacity to submit to arbitration by written instrument "any controversy existing between them," and to agree further that any court of competent jurisdiction might pass upon questions of law arising in the proceeding and render a judgment on the

[1] "Speeding up Justice thru Arbitration," Moses H. Grossman, Illinois Law Quarterly, April, 1923, p. 135; Chicago's New Trade Court, J. Kent Greene, 7 American Bar Association Journal 337.

[2] 5 Corpus Juris 20; Meacham v. The Railroad Co. 211 N. Y. 346; See Copper et al. v. Wells et al., 1 N. J. Eq. 10, 14; Howlett v. Hipson, 19 N. J. L. 109.

[3] United States Asphalt R. Co. v. Trinidad Lake P. Co., 222 Fed. 1006, 1007, 1009.

[4] Matter of Berkowitz, 230 N. Y. 261, 274. See also "Commercial Arbitration and the Law"—Julius Henry Cohen.

[5] Gowan v. Pierson, 166 Penna. State 258; Hostetter v. Pittsburg, 97 Penna. St. 119.

[6] Meacham v. R. R. Co., 211 N. Y. 346.

[7] Ferris v. Munn, 22 N. J. L. 161.

[8] Callaghan's Illinois Laws, 1917-20, Sec. 474, Laws of 1917, p. 202.

award. "A submission to arbitration shall, unless a contrary intention is expressed therein, be irrevocable." This statute was upheld in Illinois in the case of White Eagle Laundry Company v. Slawek, 296 Ill. 240. The court did not believe that such an agreement would unconstitutionally oust the courts of their jurisdiction or confer judicial power on individual arbitrators. In Massachusetts "controversies which might be the subject of a personal action at law or of a suit in equity" may be submitted to arbitration by an agreement before a justice of the peace or a special commission, and the submission cannot be revoked by either party without the consent of the other.[9] As in Illinois the award may be submitted to the court for confirmation. The Massachusetts court is given the same control over the award as if it had been made by referees appointed by it; in the Illinois statutes the findings of fact by the arbitrators are made conclusive and judgment may be had on the award as on the verdict of a jury. The arbitrators in Illinois may request the judgments of the court on question of law at any stage of the proceeding and may make their final award as a conclusion of fact for the opinion of the court on questions of law. Another important provision is the Illinois act permits parties to a submission to include by reference "the published rules of any organization or association," which become part of the contract of submission if they have been approved by the court having jurisdiction. It will be noted that in all of these statutes a close control is kept by the courts over the proceedings of the arbitrators.

The initiative in entirely breaking loose from the common law rule so far as contracts are involved came through a commercial body, the Chamber of Commerce of the State of New York. Under its influence the legislature of New York passed in 1920,[10] a statute which made a provision in a written contract to settle by arbitration a controversy thereafter arising between the parties to the contract "valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of a contract." Either party may petition the court to direct the arbitration to proceed and unless an issue is raised in respect to the making of the contract or failure to comply therewith, showing that no case is presented for arbitration, the court must make an order directing the parties to proceed with arbitration. If the making of a contract or default is in issue it must be summarily tried by the judge unless a jury trial is demanded by either party. The only issues of fact, however, to be found by the jury are whether the contract exists and whether there is a default. If they so find, then the dispute must go to arbitration. The tribunal selected by the parties, the arbitrators, and not judge and jury are to settle the dispute. Carrying this idea further, if an action is brought in court which should have been referred to arbitration, the Supreme Court on being satisfied that the issue is subject to arbitration under a contract, "Shall stay the trial of the action till such arbitration has been had in accordance with the terms of the agreement." A party may not escape by failure to name an arbitrator, for the power is given to the judge to act for him.

The New York statute was held constitutional against the charge that it violated the constitutional requirement of right of trial by jury and ousted the jurisdiction of the court. Jury trial may be waived and this is done by the consent to arbitrate. Instead of ousting the jurisdiction of the court the time and manner of the court's jurisdiction are "adapted to the convention of the parties restricting the media of proof." Matter of Berkovitz, 230 N. Y. 261.

The Committee on Commerce, Trade and Commercial Law of the American Bar Association has taken up the matter and proposed a uniform act for commercial arbitration[11] which has been substantially passed by the legislature of New Jersey. The act follows the New York statute with few modifications. The Berkovitz case interpreted the law to apply to contracts made before it was passed; a rule expressly negatived in the New Jersey act which does not apply to contracts made prior to its taking effect. The draftsman evidently doubted the application of the words in his model allowing arbitration of controversies arising out of contract, for he added, "or the refusal to perform the whole or any part thereof."

New York had already an elaborate provision for arbitration of existing controversies, expressly excepting claims to estates in real property in fee or for life.[12] The Arbitration Act made submissions under this provision enforceable and irrevocable and subjected them to the same restrictions as stipulations in contracts for future arbitration. The New Jersey Act includes submission of existing controversies and makes them irrevocable as well as agreements in a contract to arbitrate future disputes.

Instead, however, like New York and Illinois, of authorizing submission of "any controversy" between the parties, New Jersey limits its application to submission "which arises out of a contract or the refusal to perform the whole or any part thereof or the violation of any other obligation."

Thus, there is a notable difference between the character of disputes in which submission to arbitration of an existing dispute will be enforced in the New York-New Jersey statutes and in the Illinois statute and those in respect to which an agreement for future arbitration will be enforced in New York and New Jersey. The enforceable agreements for future arbitration are only controversies arising under the particular contract in which an arbitration provision is included. In Illinois and New York the field of controversies which may be submitted to arbitration after the dispute arises, is much wider. Torts are certainly included, and New York expressly permits certain disputes over real property, though excluding "claims to an estate in real property, in fee or for life." Massachusetts also by tacit exclusion prohibits real actions, though allowing a use of arbitration in any "personal action at law or suit in equity." The Illinois law allows the parties to submit "any controversy existing between them."

Wisconsin at the last legislature[13] adopted practically the New York act for the arbitration of existing controversies. The provision in the Arbitration Act of 1920, making such submissions irrevocable, was not included by the Wisconsin legislature, so, from a legislative point of view, the new statute does little more than reorganize procedure. Under the common law of Wisconsin the courts very early recognized the validity of submissions to arbitration, and later held

[9] Massachusetts General Laws, 1921—Chapter 251.
[10] Laws of 1920, Ch. 275.
[11] Reports of American Bar Association, 1921—page 355. Reports of American Bar Association, 1922—page 293. American Bar Association Committee Reports, 1923—page 80, et seq.
[12] Civil Practice Act, 1920, Article 84, formerly Code of Civil Procedure, 2365 as.
[13] Chapter 447, Laws of 1923.

that the statutory provisions did not abrogate but were in addition to the old mode.[14]

It would indeed be difficult to provide by agreement in advance that any tort action should also be referred to arbitration. For example, it would be practically impossible and unfair to the passenger to compel a passenger on a railway to agree, not to sue, but to submit to arbitration his claims for an injury in the course of the carrying out of his contract of transportation with the railway company. There is no central point at which the passenger and the company can conveniently meet before the arbitrators, and the questions involved in such an action are fault, extent of injury, and probable loss which it is much safer to leave to a jury than are the questions of custom of the trade or quality of goods involved in disputes arising over business contracts. To carry the case a step further, the impossibility of arranging for arbitral settlement of cases of damages happening to passengers of a street railway where there are no tickets or other evidences of contract, is apparent. Furthermore, there is usually no contract relation between the persons concerned in a tort action so that there appears to be no way by previous agreement between the parties of shortening the road to justice which lies through the courts in cases of personal damage.

Another interesting angle from which these arbitration statutes may be considered was developed in the matter of the Amalgamated Association of Railroad Employees, 196 App. Div. 206, N. Y. There the union moved to have the question of wages referred to arbitration under the statute. There was a contract between the company and the employees containing an arbitration provision, but the court refused the motion since in this case the men had struck and thus themselves broken the contract before they made the motion. It, furthermore, held that the contract to arbitrate did not extend to the question directly involved, but there would seem to be no reason why under the decision an agreement to arbitrate written into a contract between employer and employee could not be enforced under the statute. The bill providing for arbitration in the federal courts was amended at the instance of the representatives of the Seamen's Union who did not want seamen's wages to be subject to compulsory arbitration. There was added to the bill to take care of this condition, "nothing herein contained shall apply to contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce."

[14] See Allen v. Chase, 3 Wisc. 249. Darling v. Darling, 16 Wisc. 675.

Dry Laws and National Rights

"The seizure of the liquor stores of the British ship Berengaria in New York Harbour raises in an acute form a question of perennial difficulty, showing at the same time how great is the discrepancy in the views of international law taken by different states. The right of the territorial sovereign over merchant vessels in his waters has arisen for consideration chiefly in regard to jurisdiction over criminal offences committed on board. Thus, in the cases of the Sally and the Newton (see Westlake, vol. I, p. 261), which were private vessels of the United States in French ports, the French authorities claimed, in the face of the protests of the United States Government, jurisdiction over the vessels in respect of offences committed on board. Here the United States is found asserting the right of the flag. On the other hand, in the later case of Wildenhas, 120 U. S. Reports, I, the Supreme Court refused to deliver to his consul on habeas corpus a Belgian who had killed a fellow seaman on board a Belgian steamer. The case would seem to be *a fortiori* where the offence committed is against specific local legislation passed by the territorial sovereign, who is entitled to see his law observed within his jurisdiction. In criminal matters, the British Government has made similar claims to that of the United States (see Reg. v. Cunningham, reported in Bell's Crown Cases, p. 86). In this case three American mates of an American vessel, anchored at Penarth Roads in the Bristol Channel, murdered a fellow seaman on board. They were tried and convicted at Glamorgan Assizes, and there is no record of any protest by the Government of the United States. There can be no doubt that the territorial power has jurisdiction over foreign vessels within its waters in customs matters. It seems, therefore, difficult to see why, in principle, the United States authorities are not in law entitled to search foreign vessels in their jurisdiction for liquor and to seize it when found."—The Law Journal, June 30, 1923.

Blackstone's Bicentenary

"Within the next few days—on July 10, to be precise—will occur the two-hundredth anniversary of the birth of the most famous of English jurists. Some of Blackstone's predecessors in the art of exposition, such as Bracton, Littleton, Coke, Fortescue and Selden, may, from the historical point of view, possess more original claims to remembrance; some of his successors, such as Austin, Maine, Anson, Maitland and Pollock, may be more learned and scientific; but no legal writer has acquired so wide a celebrity—none has been read and quoted so often by laymen as well as lawyers—as the author of the 'Commentaries.' So impressed was the worthy Fuller of the value of 'Coke upon Littleton' that he predicted that 'judicious posterity would continue to admire it while Fame has a trumpet left here and any breath to blow therein.' Fame will, indeed, be breathless when the 'Commentaries' are forgotten. Twenty-one editions, containing Blackstone's text unaltered, were published between 1765 and 1844, and volumes almost innumerable have since been issued, including 'Stephen's Commentaries,' in which the famous work has been adapted to the ceaseless changes in the law.

"One reason why the 'Commentaries' have enjoyed so wide a fame—one reason, too, why they have from time to time been the subject of a canonade of technical criticism—is that the lectures on which they were founded were delivered largely with a view to making a knowledge of the law part of the intellectual equipment of every good citizen. In their literary quality lies the secret of their success. It is recorded by Colonel Fremont, the famous American Explorer, that whilst crossing the Rocky Mountains, encamped at Christmas time at a spot 12,000 feet above the level of the sea, and never before visited by man, he read the four volumes of Blackstone's 'Commentaries' to pass the time and 'kill the consciousness of his situation.' A work which, while it can still be cited in Court because of its learning, could eighty years ago form 'the Christmas amusements of a traveller on an untraversed mountain when the temperature was below zero, must possess the enduring qualities of fame."—The Law Journal, June 30, 1923.

PROBLEMS OF PROFESSIONAL ETHICS

THE bar has so vital an interest in the ethics of the bench that it cannot be amiss to draw the attention of the readers of the JOURNAL to the "Final Report and Proposed Canons of Judicial Ethics" printed in the last number of the JOURNAL. The report is accompanied by a letter from the Chief Justice, who is chairman of the committee on judicial ethics.

While lack of space precludes an extended discussion in this column of the final report, yet there is assuredly one matter to be noted which should be squarely presented to the bar of the entire country; this of course without prejudice to further discussion, should opportunity offer, of other matters contained in the final report.

Under date of January 1, 1923, certain "proposed canons" were put forward by the committee. They were published in the February number of the JOURNAL. Among these canons is:

> 29. Partisan Politics.—While entitled to entertain his personal views of political questions, and while not required to surrender his rights or opinions as a citizen, it is inevitable that suspicion of being warped by political bias will attach to a judge who becomes the active promoter of the interests of one political party against another. A judge should avoid making political speeches, contributions to party funds, the public endorsement of candidates for political office or participating in party conventions.

In the final report the foregoing appears as follows:

> 28. Partisan Politics.—While entitled to entertain his personal views of political questions, and while not required to surrender his rights or opinions as a citizen, it is inevitable that suspicion of being warped by political bias will attach to a judge who becomes the active promoter of the interests of one political party as against another. He should avoid making political speeches, making or soliciting payment of assessments or contributions to party funds, the public endorsement of candidates for political office and participation in party conventions.

It is, therefore, to be observed that upon final reflection the Committee seems to have decided to allow canon 29-28 to stand as originally drafted, except that a judge, while in the first instance urged to "avoid . . . contributions to party funds" is in the final draft admonished against "making or soliciting payment of assessments or contributions to party funds". Except for trifling changes in phrasing, the two drafts of the paragraph in question are otherwise identical.

Undoubtedly, to disapprove of "making or soliciting payment of assessments or contributions to party funds" is more impressive than merely to urge avoiding contributions to such funds. Thus there seems to be progress in the right direction. But the question which must unavoidably arise in the minds of all practicing lawyers in our forty-eight states who have had occasion to observe the working and lubrication of the party machinery when it functions by way of choosing and electing judges, and its effect upon the bench, will hardly be met by either of the suggested provisions in the code. Of course the evil is greater in some communities than in others. In the writer's community the menace is so great from assessments on judicial candidates, their efforts to meet them, and their antics in concealing them, that a mere admonition to "avoid" making or soliciting them seems pitifully inadequate.

When we lawyers from all parts of the country come together on the 29th, 30th and 31st days of this month of August, shall we not furnish such aid as we may to the judges in stopping a pernicious, degrading and sometimes corrupting practice? Bear in mind that not only is the effect on judges themselves bad, but that numbers of competent lawyers are deterred from considering a candidacy for the bench,—and this is not merely through the amount of expense involved, but because the idea of paying five per cent of an aggregate judicial salary of $50,000.00 for five years, or paying any money in order to get a judicial job, is repulsive. While it cannot be fairly said that such payments are in themselves corrupt, yet their tendency is surely corrupting.

If it prove to be a fact that the evil is widespread, this provision in the judicial code should be taken up at our Association meeting and discussed to see if it is adequate to meet the situation. Perhaps the evil cannot be stopped or even abated; but we may at least discuss it. In any event we should be able to suggest stern condemnation of such payments. We might even assure the judges that we will so far as in us lies endeavor to procure the enactment of legislation which will make it a misdemeanor for a judicial candidate to contribute to party funds or to funds to be used to promote any election at which he is or he may be a candidate for judicial honors.

If, happily, the evil is not as great throughout the individual states as it assuredly is in some of them, then perhaps, as Mr. Cleveland once observed, those next the load must bear it. But in case, as seems highly probable, the practice is so widespread that it needs the attention of our Association, why not meet it squarely? It is moreover to be observed that the committee on judicial ethics bespeaks for its final report a place on the program of our meeting; and advises the approval of the canons with their preamble. Of course in the main the draft is sound and wholesome. In parts it is searching; but in the matter of attempting to check the use of money by and for judges to secure the election of the judges by and for whom the money is paid and used, we submit, with respect, the final draft might be greatly strengthened.

In any event, is it not worth while to discuss strengthening the draft in this regard?

RUSSELL WHITMAN.

Divorce Reports and Public Morals

"The recent propaganda against publication of the sordid and degrading details of divorce cases has resulted in the introduction into the House of Commons by Sir Evelyn Cecil of a Bill entitled the Matrimonial Causes (Regulation of Reports) Act, 1923. It only applies to three kinds of judicial proceedings, namely, dissolution of marriage, nullity of marriage, and judicial separation. Why it does not cover the far worse cases of bastardy, indecent assault, and crimes of an unnatural character is difficult to understand. One would have thought that to carry out the intention of the measure which is expressed in its full title, 'to prevent injury to the public morals,' all such cases should have been included. Briefly, it is proposed that all reports of the proceedings specified, except those in appears of a technical character, such as law reports and medical journals, shall be confined to '(i) the names of the parties; (ii) the grounds on which the proceedings are brought; (iii) particulars of any argument on any point of law arising in the course of the proceedings and the decision of the Court thereon; (iv) the finding of the jury (if any), and the judgment of the court." —Law Journal.

DECISIVE BATTLES OF CONSTITUTIONAL LAW

VII. THE GENESEE CHIEF
(12 Howard 443)

By F. DUMONT SMITH
Of the Hutchinson, Kansas, Bar

THE case of the Genesee Chief, a libel in admiralty decided in 1851, presents the extraordinary spectacle of the court headed by Taney, expanding the Federal jurisdiction and power restricted by the old court, in the Thomas Jefferson (10 Wheat. 428) where it was held that the jurisdiction of the courts of admiralty was limited to the ebb and flow of the tide.

The Cuba, a railing vessel, was rammed by the Genesee Chief, a steam propellor on Lake Ontario, and sunk. The owner of the Cuba libeled the Genesee Chief in the District Court of the United States, a proceeding in rem, under the Act of February 26, 1845, extending the jurisdiction of the District Courts in admiralty, to the lakes and navigable waters connecting the same, none of which are tidal waters. Strenuous objection was made to this admiralty jurisdiction of the court because of the authority of the Thomas Jefferson, and the case carried to the Supreme Court upon that point. The court was confronted at the outset with the authority of the Thomas Jefferson, which follows slavishly the English rule that the admiralty jurisdiction is confined to the ebb and flow of the tide; that only tidal waters are public waters and under the English law, within the control of the crown. This doctrine has grown up in England with all its concurrences of riparian rights; rights of fisheries, flotsam, jetsam and the concomitants of public waters. The doctrine was a natural one in England where in effect there are no navigable streams except tidal waters.

On all the great rivers of England, like the Thames, the Severn, and the Humber, navigation ceases with the tide. Nor at the time the decision was rendered in the Thomas Jefferson, in the days of sail, was any stream with a steady current navigable. On the navigable tidewater rivers, vessels generally were compelled to go up with the flood and out with the ebb. The opening of navigation of the great rivers of America, like the Mississippi and Ohio, by the use of steam, had entirely changed conditions. The English law was no longer applicable, but it required courage and foresight to reverse the case of the Thomas Jefferson which had been the law for almost forty years and been recognized as such by at least one other decision. But the court held there were no property rights involved in that decision, that it had not become a rule of property and that therefore, *stare decisis* was not compelling.

There was but one question before the court, whether the Act of 1845, extending the admiralty jurisdiction to waters not tidal in their character, was constitutional. The court held that the jurisdiction of the court could not be made to depend upon the commerce clause; that it could only be sustained on the ground that the great lakes and the great rivers of the country navigable in fact were navigable in law, as such, public waters under the jurisdiction of the Federal government and subject to the jurisdiction of the constitutional Federal courts. The court says:

> If this law, therefore, is constitutional, it must be supported on the ground that the lakes and navigable waters connecting them are within the scope of admiralty and maritime jurisdiction, as known and understood in the United States when the Constitution was adopted.
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> If the meaning of these terms was now for the first time brought before this court for consideration, there could, we think, be no hesitation in saying that the lakes and their connecting waters were embraced in them. These lakes are in truth inland seas. Different states border on them on one side, and a foreign nation on the other. A great and growing commerce is carried on upon them between different states and a foreign nation, which is subject to all the incidents and hazards that attend commerce on the ocean. Hostile fleets have encountered on them, and prizes been made; and every reason which existed for the grant of admiralty jurisdiction to the general government on the Atlantic seas, applies with equal force to the lakes. There is an equal necessity for the instance and for the prize power of the Admiralty Court to administer international law, and if the one cannot be established, neither can the other.
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> Again the union is formed upon the basis of equal rights among all the States. Courts of admiralty have been found necessary in all commercial countries, not only for the safety and convenience of commerce, and the speedy decision of controversies, where delay would often be the ruin, but also to administer the laws of nations in a season of war, and to determine the validity of captures and questions of prize or no prize in a judicial proceeding. And it would be contrary to the first principles on which the Union was formed to confine these rights to the States bordering on the Atlantic, and to the tide water rivers connected with it, and to deny them to the citizens who border on the lakes, and the great navigable streams which flow through the western States. Certainly such was not the intention of the framers of the Constitution; and if such be the construction finally given to it by this court, it must necessarily produce great public inconvenience, and at the same time fail to accomplish one of the great objects of the framers of the Constitution; that is a perfect equality in the rights and the privileges of the citizens of the different states; not only in the laws of the general government, but in the mode of administering them. That equality does not exist, if the commerce on the lakes and on the navigable waters of the West are denied the benefits of the same courts and the same jurisdiction for its protection which the Constitution secures to the States bordering on the Atlantic.
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> The only objection made to this jurisdiction is that there is no tide in the lakes or the waters connecting them; and it is said that the admiralty and maritime jurisdiction, as known and understood in England and in this country at the time the Constitutition was adopted, was confined to the ebb and flow of the tide.
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> Now, there is certainly nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jurisdiction, nor anything in the absence of a tide that renders it unfit. If it is a public navigable water, on which commerce is carried on between different states or nations, the reason for the jurisdiction is precisely the same. And if a distinction is made on that account, it is merely arbitrary, with-

out any foundation in reason; and, indeed, would seem to be inconsistent with it.

In England, undoubtedly, the writers upon the subject, and the decisions in its courts of admiralty, always speak of the jurisdiction as is confined to tide water. And this definition in England was a sound and reasonable one, because there was no navigable stream in the country beyond the ebb and flow of the tide; nor any place where a port could be established to carry on trade with a foreign nation, and where vessels could enter and depart with cargoes. In England, therefore, tide water and navigable water are synonymous terms, and tide water, with a few small and unimportant exceptions, meant nothing more than public rivers, as contradistinguished from private ones; and they took the ebb and flow of the tide as the test, because it was a convenient one, and more easily determined the character of the river. Hence the established doctrine in England, that the admiralty jurisdiction is confined to the ebb and flow of the tide. In other words it is confined to public navigable waters.

At the same time the Constitution of the United States was adopted, and our courts of admiralty went into operation, the definition which had been adopted in England was equally proper here. In the old thirteen States the far and greater part of the navigable waters are tide waters. And in the states which were at that period in any degree commercial, and where courts of admiralty were called on to exercise their jurisdiction, every public river was tide water to the head of navigation. And indeed, until the discovery of steam boats, there could be nothing like foreign commerce upon waters with an unchanging current resisting the upward passage. The courts of the United States, therefore, naturally adopted the English mode of defining a public river, and consequently the boundary of admiralty jurisdiction. It measured it by tide water. And that definition having found its way into our courts, became, after a time, the familiar mode of describing a public river, and was repeated as the cases occurred, without particularly examining whether it was as universally applicable in this country as it was in England. If there were no waters in the United States which are public, as contradistinguished from private, except where there is tide, then unquestionably here as well as in England, tide water must be the limit of admiralty power. And as the English definition was adopted in our courts, and constantly used in judicial proceedings and forms of pleading borrowed from England, the public character of the river was in process of time lost sight of, and the jurisdiction of the admiralty treated as if it was limited by the tide. The description of a public navigable river was substituted in the place of the thing intended to be described. And under the natural influence of precedents and established forms, a definition originally correct was adhered to and acted on, after it had ceased, from a change in circumstances, to be the true description of public waters. It was under the influence of these precedents and this usage, that the case of The Thomas Jefferson, 10 Wheat. 428 was decided in this court; and the jurisdiction of the courts of admiralty of the United States declared to be limited to the ebb and flow of the tide. The Steamboat Orleans v. Phoebus, 11 Pet., 175, afterwards followed this case, merely as a point decided.

In the case of Waring vs. Clark (5 How. 141, 1848) the court had shown a disposition to depart from the doctrine of the Thomas Jefferson, but it was finally decided that the collision there considered was within the limit of tidal waters. The court as further evidence of contemporary opinion on this point cited an early Act of Congress:

> It is evident that a definition that would at this day limit public rivers in this country to tide-water rivers is utterly unadmissible. We have thousands of miles of public navigable water, including lakes and rivers in which there is no tide. And certainly there can be no reason for admiralty power over a public tide water, which does not apply with equal force to any other public water used for commercial purposes and foreign trade. The lakes and the waters connecting them are undoubtedly public waters; and we think are within the grant of admiralty and maritime jurisdiction in the Constitution of the United States.
>
> We are the more convinced of the correctness of the rule we have now laid down, because it is obviously the one adopted by Congress in 1789 when the government went into operation. For the 9th section of the Judiciary Act of 1789, by which the first courts of admiralty were established, declares that the district courts "shall have exclusive cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under the laws of impost, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas."
>
> The jurisdiction is here made to depend upon the navigable character of the water, and not upon the ebb and flow of the tide. If the water was navigable it was deemed to be public and if public, was regarded as within the legitimate scope of the admiralty jurisdiction conferred by the Constitution.

From that time on under many circumstances in many cases, the Supreme Court has consistently approved the case of the Genesee Chief and held steadfast to the doctrine, that navigable in fact is navigable in law; that the true test of navigability and the settlement of rights in connection therewith, depends wholly upon the question, whether commerce, as generally understood is borne upon the waters in question. As corollary to this definition of "public waters" is the inclusion of all rights pertaining to such waters, as for instance, upon a navigable water the riparian owner owns to the ordinary low water mark, upon non-navigable streams which are private waters, to the center of the main channel or thread of the stream.

If the stream be navigable, the bed of it belongs to the State and may not be encroached upon by private parties. The State of Kansas has held that the Arkansas River is navigable in law and that the bed of that stream belongs to the State and derives a considerable revenue from sand and gravel taken from the stream. This is, however, contrary to the very recent decision of the Supreme Court of the United States as to the same stream in Oklahoma.

If the rule of the Thomas Jefferson had prevailed there would have been endless confusion as to all rights upon the great rivers, in the operation of interstate ferries and the construction of interstate bridges; conflicting jurisdiction in cases of collision and the like. Under this decision all of the navigable waters of the United States are public waters, subject to Federal control and under the jurisdiction of the Federal courts in admiralty. Few decisions have been of greater importance than this.

The Confiscation Myth

(*Continued from page 491*)

The Allied Governments at the Paris Conference in May, 1923, are said to have insisted that if they agreed to pay the expenses of the Army of Occupation, the United States must abandon all of its other claims against Germany. No such claim was ever made by the Allied Governments, but they did insist that if an agreement was reached as to the Rhine claims, the United States apply the property placed in its possession by Germany, to the satisfaction of American claims, and in the event of our decision not to use the property, they said that they would not permit Germany to make payment out of the assets pledged to them.

This would seem to be a just and proper attitude and exactly what could have been expected. There can be no reason, legal or moral, for refusing to take advantage of our Treaty rights.

Final Program for Minneapolis Meeting—Continued

(*Continued from Page 494*)

Charles E. Brock, of Ohio, Chairman of the Section, will preside.

Address by Charles E. Brock, Chairman.

Reports of Committees.

Discussion.

Section of Legal Education

The Section will hold its session in the East Ball Room, Curtiss Hotel, on Tuesday, August 28th, 2:30 p. m.

Annual Address of Chairman, Silas H. Strawn.

Report of Secretary.

Report of Council on Classification of Law Schools pursuant to Resolution of the American Bar Association.

Report of Treasurer.

Election of Officers.

Section of Public Utility Law

The Sixth annual meeting of the Section will be held in Empire Room, Radisson Hotel, on Monday and Tuesday, August 27th and 28th.

There will be three sessions of the Section: Monday, August 27th, at 2 p. m., and Tuesday, August 28th, at 10 a. m. and 8 p. m.

Monday, August 27th, 2 p. m.

Address of John B. Sanborn, of Wisconsin, Chairman.

Report of Secretary, and address on "Some Utility Questions."

Appointment of Committees.

Discussion of questions suggested by address.

Questions to be submitted by members of the Section upon which discussion is desired.

Miscellaneous business.

Tuesday, August 28th, 10 a. m.

Address, Leslie Craven, Illinois, "Public Service Company Valuations; A Statement of the Problem."

Stated discussion of this matter by two persons to be named.

General Discussion.

Discussion of subjects submitted at Monday afternoon session.

Reports of Committees.

Election of Officers.

Miscellaneous business.

Tuesday, August 28th, 8 p. m.

Continuation of discussion of the matters submitted at the former sessions.

Nathaniel T. Guernsey, of New York, will further discuss the subject matter of his paper submitted at San Francisco, "Rate-Making Powers Under Commission Laws."

Miscellaneous business.

Adjournment. (*Continued on next page*)

WEST RIVER DRIVE, LOOKING DOWN THE MISSISSIPPI, MINNEAPOLIS

Section of Criminal Law

The third annual meeting of the Section will be held in the Viking Room of the Radisson Hotel, Tuesday, August 28.

Afternoon Session, 2:30 p. m.

President's address—Hon. Floyd E. Thompson, Justice of the Supreme Court of Illinois.

"A Practical Consideration of Everyday Police Problems"—Hon. Floyd B. Olson, County Attorney, Hennepin County, Minnesota.

Report from Committee on Criminal Records and Statistics of The American Institute of Criminal Law and Criminology—Mr. Frederick B. Crossley, Professor of Law, Northwestern University Law School.

General Discussion.

Evening Session, 8:30 p. m.

"The Responsibility for Prompt Justice"—Hon. Oscar Hallam, formerly Justice of Supreme Court, Minnesota.

"The Human Element in the Administration of Criminal Law"—Mr. R. Justin Miller, Professor of Law, University of Minnesota, formerly County Attorney, Kings County, California.

Report from Committee on Law Enforcement.

General Discussion.

National Association of Attorneys-General

There will be two sessions held: Monday, August 27th, at 10 a. m., in the Empire Room, Radisson Hotel, and Tuesday, August 28th, at 10 a. m., in Rooms 120-1, Radisson Hotel.

Papers will be read as follows:

Charles B. Griffith (Kansas): "The Price We Pay for Failure to Enforce Law."

Jesse W. Barrett (Missouri): "The National Branch Bank Case."

Wellington D. Rankin (Montana): "Some Problems of Railroad Transportation."

Samuel M. Wolfe (South Carolina): "Double Jeopardy."

Herman L. Ekern (Wisconsin): "The Attorney General and Insurance."

R. N. Shaw (Maine): "Water Power in States."

Harvey H. Cliff (Utah): "The Supreme Power in Government."

E. T. England (West Virginia): "History and Result of Virginia Debt Controversy."

L. S. Spillman (Nebraska): "Increasing Responsibilities of the Attorney General's Office."

The Assistant to U. S. Attorney General Daugherty will deliver an address on "Co-operation Between Federal and State Authorities in Law Enforcement."

Attorney Woodruff, of Pennsylvania, will talk on a subject not yet selected.

Attorney General Clifford L. Hilton, of Minnesota, President of the Association of Attorneys General, will preside at all sessions.

Headquarters and Hotels

The Radisson Hotel, Minneapolis, has been selected as headquarters. A list of hotels and prices is printed below. Mr. John Junell, First National Bank Building, Minneapolis, Minnesota, has charge of reservations for members and delegates. In writing to Mr. Junell please state preference of hotel, time of arrival, period for which the rooms are desired, and how many persons will occupy each room. Members may make reservations directly with hotel if they so desire.

Mr. Junell has exhausted all available rooms at the Radisson Hotel, but the other hotels listed below are conveniently located (see plat on page 376) and members will be equally comfortable. These are first-class hotels both as to rooms and service. Members must realize that no one or two hotels can accommodate even a majority of our members, and the anticipated attendance will require the use of accommodations at all of the hotels listed below.

RATES—MINNEAPOLIS HOTELS

(All Rooms with Bath)

Hotel	Single (one person)	Double (two persons)
Radisson	$3.50-$7.00	$6.00-$10.00
Curtis	2.00- 4.00	3.00- 6.00
Dyckman	2.50- 5.00	4.00- 7.00
West	2.50- 5.00	4.00- 6.50
Andrews	2.50- 3.50	3.50- 5.00
Leamington	3.50- 5.00	5.00- 10.00
Maryland	2.50- 5.00	3.00- 8.00
Buckingham	2.50	3.50
Ogden	2.00- 3.00	3.00- 4.00
Oak Grove	3.00	5.00

NOTE.—Members desiring to stop at Hotels in Saint Paul (about 30 minutes ride by motor bus from the Auditorium at Minneapolis) will find the rates at the Hotel Saint Paul for single room $4-$6 and double room $5-$7, and at the Hotels Ryan, St. Francis, Frederick and Commodore for single room $3-$5 and double room $4-$6; all rates including bath.

Transportation and Special Trips

1. *Summer rates.* Summer tourist rates to Minneapolis and return will be in effect from June 1 to Sept. 30, 1923, available only for members residing in the Pacific Coast and in states west of Rocky Mountains. Members from these states are requested to inquire at the nearest ticket office for schedule of rates, which will be based on a single fare and a small fraction thereof for the return trip.

2. *Special convention rates.* For the benefit of members residing in the eastern and southern and all mid-western states, including Montana, Wyoming, Colorado and all states east of Rocky Mountains, arrangements have been made with the railroads whereby members of the American Bar Association and dependent members of their families who attend the annual meeting will have the benefit of a *fare and one-half.* They will pay *full fare going to Minneapolis,* and, upon purchasing railroad ticket, will ask for a certificate which must be viséd at Minneapolis by the Secretary of this Association, thus entitling the holder to *one-half fare on the return trip.* This plan is conditional upon a minimum of 250 return trip tickets and the return trip must be made via the same route as going and within the time specified on the ticket.

The following directions are submitted:

1. Tickets at regular one-way tariff fare for the going journey from the various passenger territories may be bought on the following dates:

From Arizona, British Columbia, California, Nevada, Oregon, and Washington, Aug. 17-19, incl., and Aug. 23-27, incl. (Summer excursion fares on a lower basis than certificate plan fares will also be in effect from this territory. Tickets on sale daily from May 15-Sept. 15, incl., with return limit of October 31, 1923).

From Colorado (except Julesburg), Idaho, Montana,

New Mexico, Utah and Wyoming, Aug. 18-20, incl., and Aug. 24-28, incl.

From Oklahoma and Texas, Aug. 18-20, incl., and Aug. 24-28, incl.

From Arkansas, Kansas, Louisiana and Missouri, Aug. 20-22, incl., and Aug. 25-29, incl.

From Illinois, Iowa, Kansas, Minnesota, Missouri, Nebraska, Nor. Michigan, No. Dakota, So. Dakota, Wisconsin, and from Julesburg, Colo., Aug. 20-22, incl., and Aug. 25-29, incl.

From the Central Passenger Territory (approximately from the Mississippi River to Allegheny Mountains north of the Ohio River), Aug. 20-22, incl., and Aug. 25-29, incl.

From New England states, Aug. 18-20, incl., and Aug. 24-28, incl.

From New York State (east of Buffalo and Salamanca), New Jersey, Pennsylvania (east of Erie, Oil City and Pittsburgh), Delaware, Maryland, District of Columbia, Virginia and West Virginia (east of Wheeling, Parkersburg and Kenova), Aug. 18-20, incl., and Aug. 24-28, incl.

From Southeastern Passenger territory (approximately east of Mississippi River and south of Ohio River and Virginia) Aug. 18-22 incl., and Aug. 25 29 incl.

2. When purchasing your going ticket, ask for a CERTIFICATE. Do not make the mistake of asking for a *receipt*. See that your certificate is stamped with the same date as your ticket. Sign your name to the certificate in ink.

3. Certificates are not kept at all stations. Ask your home station whether you can procure certificates and through tickets to the place of meeting. If not, buy a local ticket to nearest point where a certificate and through ticket to place of meeting can be bought.

4. Immediately on your arrival at the meeting, present your certificate to the endorsing officer, Secretary W. Thomas Kemp, as the reduced fare for the return journey will not apply unless you are properly identified as provided for by the certificate, and your certificate is validated by the Joint Agent who will be at the Secretary's office during the meeting.

5. If the necessary minimum of 250 regularly issued certificates are presented to the Joint Agent, and your certificate is validated, you will be entitled to a return ticket via the same *route* as the *going journey* at one-half of the normal one-way tariff fare from place of meeting to point at which your certificate was issued up to and including September 5th, 1923.

6. Return tickets issued at the reduced fare will not be good on any limited train on which such reduced fare transportation is not honored.

3. *Special trip via Great Lakes.* A special trip going to Minneapolis via the Great Lakes has been arranged and will be in charge of our Transportation Committee. All members who can avail themselves of this route are urged to do so, as the party will be together on the steamer throughout a delightful trip of four days' duration with several stops at interesting points en route. This special trip will be made on the steamer Juanita of the Great Lakes Transportation Company, leaving Buffalo on Thursday, August 23, at 9:30 (standard time) A. M., arriving the same day in Cleveland at 10:00 P. M., and leaving Cleveland one hour later; arriving in Detroit, Friday, August 24, at 7:00 A. M., and leaving four hours later; arriving at Mackinac Island, Saturday, August 25, at 11:00 A. M., remaining two hours; arriving at Sault Ste. Marie the same day at 6:00 P. M., and leaving one hour later; arriving at Houghton, Mich., Sunday, August 26, at noon and remaining five hours; arriving at Duluth Monday, August 27, at 7:30 A. M.

At Detroit, the Detroit Bar Association in conjunction with the Lawyers' Club will entertain the members by meeting them at the boat at 8 o'clock with motors for a ride about the city to the Park and Boulevard, with the opportunity of examining the factories at the choice of the individual members.

At Mackinac, the boat remains two hours and arrangements will be made for horse drawn vehicles around the Island. Mackinac Island is a State reservation and no motor vehicles are allowed. The fare for the drive around the Island is $1.50 per passenger.

At Houghton, we remain from noon until 5 o'clock. The Houghton County Bar Association will supply automobiles for drive in Houghton County and vicinity. Guests who desire can drive from Houghton to Lake Linden, about ten miles, where the Calumet and Hecla Stamp Mills and Smelters are located, and from there to Calumet where there are several mines, about four miles from Lake Linden, and from Calumet back to Houghton, about thirteen miles, going along the Copper Range by the Quincy Mining Company and through the city of Hancock. Another choice is a trip from Houghton through the South Range district, where the Copper Range mines are located. The Houghton County Bar Association has also arranged so that any of the members who prefer can avail themselves of the Country Club golf course.

Mr. H. G. Gearhart, First National Bank Building, Duluth, Minn., a member of the Entertainment Committee of the Minnesota Bar Association, has arranged an interesting automobile trip around Duluth and suburbs during the forenoon with luncheon at the Country Club at noon. Those desiring to play golf at the Country Club may do so during the forenoon, joining the rest of our party at luncheon. Members will board a special train via Northern Pacific Railroad from Duluth to Minneapolis and will arrive in Minneapolis about 6.30 P. M., August 27th.

The return trip from Minneapolis may be made by rail or by lake steamer regular schedule.

Reservations for the special lake trip are in charge of Mr. Loran L. Lewis, Jr., Erie County Savings Bank Building, Buffalo, N. Y. Members are requested to communicate with Mr. Lewis at their earliest convenience, stating room accommodations desired and place at which steamer will be boarded—Buffalo, Cleveland or Detroit. In securing tickets to Minneapolis members should purchase transportation from Duluth to Minneapolis by Northern Pacific Railroad which supplies special train above mentioned.

4. *Special trains Chicago to Minneapolis.*

Special trains from Chicago to Minneapolis have been arranged for on the following schedule and lines, leaving Chicago August 27:

Official Night Train	Official Morning Train
Chgo, Milwaukee & St. Paul Ry.	Via Burlington Ry.
Pioneer Limited Route	Mississippi River Scenic Route
(Standard Central Time)	
Lv. Chicago .....6:30 P. M.	Lv. Chicago .....10:00 A. M.
Ar. Minneapolis ..8:00 A. M.	Ar. Minneapolis .10:30 P. M.

Fare for the special trains $21.99 Chicago to Minneapolis and return and this is how to secure this reduced rate,—you purchase a regular one-way ticket at the regular one-way fare from your home station to Minneapolis AND ASK THE TICKET AGENT FOR A CONVENTION CERTIFICATE. This certificate when validated by the Secretary will permit all members one-half rate returning via the same route traveled on the going trip. (See further information under heading 2, Special convention rates).

Requests for reservations and further information regarding special trains and convention tours to the Pacific Coast can be secured by writing Louis J. Behan, 1352 Otis Bldg., Chicago, Ill., in charge of arrangements for American Bar Association and Chicago Bar Association.

5. *Other trips before or after meeting.* The Committee has collected much data upon various interesting tours which may readily be combined with the trip to Minneapolis. (For tours suggested by the committee see July JOURNAL, pp. 440-1.)

American Bar Special From Dixie

Mr. Cornelius Otts, Spartansburg, S. C., has arranged a special train leaving Spartansburg August 4th, routed via Atlanta, Chattanooga and Nashville. For itinerary, rates, dates and other information, see page 442 of July Journal or write to Mr. Otts.

Michigan Law Alumni Luncheon

There will be a luncheon of the University of Michigan Law Alumni on Thursday, Aug. 30, to which all Michigan Law graduates are welcome. Those expecting to attend will please notify Mr. John Junell, 630 First National—Soo Line Building, Minneapolis, Minn.

Harvard Law School Luncheon

There will be a luncheon in the main dining room of the Minneapolis Club on Wednesday noon, August 29th, for graduates and former students of the Harvard Law School. Chief Justice Wm. H. Taft and Professor Samuel Williston will speak and Secretary of State Charles E. Hughes will be present and will speak if he is able to get to Minneapolis by that date.

It is planned at this time to organize a Harvard Law School group of the American Bar Association, the object of which will be to induce attendance of Harvard Law School graduates at American Bar Association meetings. One of the methods by which this is hoped to be accomplished will be the holding of ten year class re-unions at the time of the American Bar Association meetings.

Those planning to attend this luncheon must register for the same before ten o'clock on the day of the luncheon or else notify the undersigned at the above address. This is necessary in order that arrangements for taking care of the proper number may be made.

MORRIS B. MITCHELL.

Reception Committee

President Davis has appointed the following Reception Committee:

George W. Buffington, Chairman.....Minnesota
E. H. Cabaniss.....Alabama
F. E. Curley.....Arizona
Ashley Cockrill.....Arkansas
Beverly L. Hodghead.....California
Herbert S. Hadley.....Colorado
C. L. Avery.....Connecticut
Josiah Marvel.....Delaware
Charles Henry Butler.....District of Columbia
William Hunter.....Florida
Francis M. Oliver.....Georgia
James F. Ailshie.....Idaho
Roger Sherman.....Illinois
Louis B. Ewbank.....Indiana
Jesse A. Miller.....Iowa
F. Dumont Smith.....Kansas
Maurice K. Gordon.....Kentucky
George H. Terriberry.....Louisiana
Arthur Ritchie.....Maine
John Hinkley.....Maryland
Hollis R. Bailey.....Massachusetts
Wade Millis.....Michigan
James S. Sexton.....Mississippi
W. L. Sturdevant.....Missouri
William T. Pigott.....Montana
Francis A. Brogan.....Nebraska
Hugh H. Brown.....Nevada
James W. Remick..New Hampshire
E. A. Armstrong.....New Jersey
A. M. Edwards.....New Mexico
William L. Ramson...New York
R. R. King, Jr....North Carolina
Lee Combs.....North Dakota
Paul Howland.....Ohio
C. B. Ames.....Oklahoma
James B. Kerr.....Oregon
Francis Rawle.....Pennsylvania
Thomas A. Jenckes....Rhode Island
Hunter A. Gibbes.South Carolina
John H. Voorhees..South Dakota
Percy D. Maddin.....Tennessee
W. H. Burges.....Texas
C. R. Hollingsworth.....Utah
George B. Young.....Vermont
Robert R. Prentis.....Virginia
O. B. Thorgrimson..Washington
Harvey F. Smith..West Virginia
John B. Sanborn.....Wisconsin
William C. Kinkead...Wyoming

Luncheons and Conferences of Secretaries

On Wednesday, Aug. 29, at 12:30 P. M. and at the same hour each succeeding day there will be luncheons and conferences of the Secretaries of State Bar Associations. Arrangements are being made by R. Allan Stephens, Secretary of the Illinois Bar Association.

FEDERAL ESTATE TAX

Some Practical Considerations and Suggestions Relating to Transfers Made in Contemplation of Death or to Take Effect and Enjoyment at or After Death

By Leo V. Cleary
Of the Chicago, Illinois, Bar

SINCE the enactment of the Revenue Acts of 1916 and as amended in 1917, the Revenue acts of 1918 and 1921 and the promulgation of the regulations thereunder, important questions relating to transfers made in contemplation of death or to take effect and enjoyment at or after death are constantly arising. The two questions of transfer are so closely related that they are herein treated as one. The question therefore always before the representatives of any estate subject to Federal Estate tax may be summarized as follows:

> Did the deceased make any transfers during his life time within the contemplation and construction of the various Estate Tax Acts and regulations?

The United States Supreme Court in the case of Schwab V. Doyle decided that the Federal Estate Tax Act of 1916 did not contain words sufficient to make the provision of the Act relative to transfers made in contemplation of death retroactive. Hence it will be necessary for all taxpayers coming within the provision of this Act to file a claim for refund of taxes so paid. These claims for refund under advantage of the Supreme Court decision relative to the 1916 Federal Estate Tax law.

> Regulations 63—Article 17. Nature and Time of Transfer—A transfer made by the decedent at any time, and in any manner, is taxable when made in contemplation of or intended to take effect in possession or enjoyment at or after his death, provided it was not a bona fide sale for a fair consideration in money or money's worth. To constitute such a sale it must have been made in good faith, and the price must have been a fair equivalent, and reducible to a money value. The value of property, where title was so transferred by the decedent before September 9, 1916, is to be included in his gross estate if his death occurred after the effective date of the Revenue Act of 1918, but is not to be included if he died prior thereto.

Under the foregoing Regulation, it is plainly evident that transfer made by decedents dying since February 25, 1919, are taxable provided they are made two years prior to his death, while they are not taxable under the prior Acts of 1916 and 1917 if the transfer was made prior to the effective date of those Acts.

The Revenue Acts of 1918 and 1921 do contain words which made the Acts relating to transfers made in contemplation of death retroactive, in that, these two laws specifically stated

> whether such transfer or trust is made or created before or after the passage of this Act.

The Supreme Court of the United States has settled the question of the retroactive effect of the 1916 Act and also the 1917 Act. We now come to this all important question under the Acts of 1918 and 1921. As above stated they contain words that are retroactive and hence it is the belief that they would be held to be retroactive. However, the taxpayer still has the same questions to solve under the Acts of 1918 and 1921; namely:

> Was the transfer made by the decedent during his life time, one which comes within the provisions of the Internal Revenue Acts of 1918 and 1921?

It would appear that the answer to the foregoing question was very simple, but upon investigating the surrounding facts relative to transfers, you will probably find that the facts contain so many ramifications and variations that your inquiry will resolve itself into a court of inquiry to determine the taxability or non-taxability of the particular case. The Internal Revenue Acts and Regulations relative to Estate Tax do not lay down for us clear and concise tests which may be applied in order to determine the taxability of a transfer made in contemplation of death. However, it would appear from the law and regulations that certain specific tests could be applied which are noted as follows:

First: What was the age of the decedent at the time of the transfer and on the day of death?

Second: What was the condition of the decedent's health at the time of the transfer? (This would necessarily mean whether he was suffering from any serious physical ailment.)

Third: Was the transfer complete? Did the decedent reserve any income for himself?

Fourth: Was the transfer colorable?

Fifth: Was the transfer made for the purpose of defeating the Federal Estate and Inheritance taxes?

Sixth: What was the motive for making the transfer?

Seventh: Was the transfer made at the time of the marriage of a son or daughter or upon some other specific occasion?

Eighth: What did the Local Inheritance Tax officer decide as to its taxability?

When transfers are made more than two years prior to the day of death of the decedent, the burden of proof is upon the Government and the Department to show that they come within the provisions of the Internal Revenue Acts relating to transfers. On the other hand, if the transfer is made to take effect and does take effect less then two years prior to the decedent's death, the burden of proof is upon the representatives of the estate to show that the transfers were not made in contemplation of death.

The words "contemplation of death" as interpreted in numerous court decisions are held to mean not death as contemplated in a common sense that all men look upon death as inevitable, but as restricted to contemplation of the event as imminent. That is, if you should transfer some property to your own son tomorrow when you were in a sound physical condition and you died of acute indigestion the following day, it could not be said that the transfer was made in contemplation of death because your death was not imminent.

When you have applied the foregoing test to your particular statement of facts, and made your decision

upon the taxability, you then come to the question, how are we going to prove these facts? The proof may be made in the following manner:

First: By the family physician or the physician who attended the decedent during his last illness.

Second: By the decedent's friends and neighbors.

Third: By the decedent's servants.

Fourth: By the decedent's beneficiaries.

Fifth: By anyone familiar with the decedent's physical condition, his habits, his business, or his private affairs.

The foregoing is a simple guide for the benefit of those who wish to determine the question of the taxability of transfers made in contemplation of death.

Many taxpayers today are arranging their affairs in a business-like manner so that their heirs will not suffer untold hardships after their decease. This is exercising sound business discretion. All taxpayers should do the same, as far as possible while they have the opportunity. It makes little difference whether one is young or old.

The lawyer and Trust Company of today have a service to render. Are they rendering it?

LETTERS OF INTEREST TO THE PROFESSION

Court Decisions and Public Utility Valuation—The Supreme Court's Traditions of Dissent—A Correction—Objective and Subjective Doubt—What Marshall Meant by "Doubtful Case"—The Presumption of Constitutionality—Not a Recent Discovery—An Argument from the Concrete

BALTIMORE, MD., July 3.—To the Editor: Professor Robert L. Hale, of Columbia University, commenting in the June issue of the "Journal"[1] upon the recent Supreme Court decision in the Southwestern Bell Telephone Case, handed down May 21st, 1923, does me the honor to include me, along with Mr. Harte of the Connecticut Company and seven Justices of the United States Supreme Court, among "those whose minds are not adapted to thinking."

My pleasure at finding myself in such distinguished company assuages somewhat my grief at my failure to win Professor Hale's approval, but I find it difficult to forgive him for what seems to me an inexcusable misrepresentation of the position which I have actually taken. Anyone reading his article would infer that I was attempting to boost in every possible way the value which is to be assigned to a public utility property and, in particular, he makes the definite assertion that "Mr. Maltbie throws off the disguise when he insists that the companies be permitted to earn a return on going value based on earnings yielded by the existing rates."

Professor Hale's real thesis, as I understand it, is that value in the last analysis is determined by earning power, and that therefore an adjustment of rates on the basis of value is illogical, his conclusion being that rates must be fixed upon prudent investment. I waive altogether for the moment the question as to whether his theory of value is sound, but I may be permitted to point out that in the article which he reviews I discuss valuation law and practice as they are and not as they might have been if the Federal constitution and the decisions of the United States Supreme Court had been of a type more satisfactory to my critic. I am writing on a practical matter for practical men, and for us the courts of last resort have definitely settled certain facts, among which may be included these:

A. Reasonableness of a rate shall be measured by the return it yields on present value.

B. Present value is not necessarily either original cost or present-day reproduction cost, but is a thing to be determined by a consideration of all of the circumstances in each individual case.

C. The present value of smooth-working organization is something more than the aggregate of the values of the physical units which constitute its plant.

Under these conditions I must, if I covered my subject, discuss going value. In doing so I pointed out that the Wisconsin Method yielded, not value, but cost of establishing business; and that this cost might be in excess of any present value, which is of course merely the conclusion reached by the Supreme Court in the Galveston Case.

So far from claiming, however, that the failure of the Wisconsin Method to yield present value justified the capitalization of present earnings, which I understand to be Professor Hale's charge, I said that, "There can be from the very nature of the case no absolute measurement, since we have no standard of going concern value against which to make a comparison."

I said, it is true that if two concerns had the same investment and served the public under the same regulation and at the same rates, but with different net returns, the difference in net return is "a measure" (not be it noted, *the* measure) of the *difference* in their going values, but this means only that its excess earnings are an evidence of a more efficient organization and/or of the exercise of better judgment in its location, construction, and development, all of which it is to the interest of the general public to reward.

Under the law as it is this additional reward can be demanded only as a return on present value. The courts in general have agreed with the commercial world that the value is there, and when presented with proper evidence of its existence have allowed a return upon it. But so far as I know no court, commission, or utility has ever attempted to measure going value by capitalizing present earnings.

But is it true that the lack of agreement between Professor Hale and the seven members of the Supreme Court is due entirely to the lack of their intellectual capacity to handle rate cases? Some little experience with critics of the law and of judicial opinions has convinced me that when a critic attacks either the intelligence or the integrity of the Supreme Court my time is more profitably employed in studying the workings of the critic's mind than in sympathizing with the Court.

Therefore I raise the question as to whether Pro-

[1] Political and Economic Review, American Bar Association Journal, June, 1923, p. 392.

fessor Hale's basic statement as to value is sound. He says "to judge the reasonableness of rates by the return they yield on the value of the property is to reason in a circle, for the value is the result of the rates charged."

Now just what does the clause "value is the result of the rates charged" mean? Of course he should have said "the result of the net return yielded by the rates charged," but what does "result of" mean?

If it means that value (V) is determined by capitalizing the net return (R) at a fair rate (f), then Value equals Return divided by fair rate

$$(V = R/f)$$

and the statement that the return should be a fair per cent of the value is merely Return equals Value multiplied by fair rate

$$(R = fV)$$

which is the same statement in another form.

If this is our critic's meaning then, granting that his premise is true, he is correct in his conclusion that the Supreme Court Justices, Mr. Harte, and myself are reasoning in a circle, and we are all as foolish as he thinks we are.

If, for example, a concern has invested $100 and makes a net return of $1600, and if 8% is fixed as a fair rate, then its value is $20,000 and a fair return, being 8% on $20,000, is $1,600.

This is the sort of reasoning in a circle Professor Hale accuses Mr. Harte and myself of trying to put over on the courts, which "have done little to justify any other opinion of their intellectual capacity."

Our critic apologizes for "threshing over old straw" but is really engaged in the equally futile operation of knocking down a straw man which he himself has set up. So far as my knowledge goes, this definition of value is not accepted by any one whose mind, to borrow my critic's phrase, is adapted to thinking. Certainly no investor, utility, commission, or court has ever accepted it.

In other words his premise, if this is his meaning, is not true. The truth is that value is much more complex than is indicated by the simple formula

$$V = R/f$$

It is dependent upon rate of return, it is true, but also upon investment, upon present value of tangible and intangible property, upon probable permanence of public demand, upon amount of speculative risk, and upon a multitude of other elements. No one has yet written the formula for the general case, but the simplest case that can be conceived is represented by the formula.

$$V = a + bR$$

where a and b are known quantities independent of R.

Confronted with this sort of a case an investor, if his mind worked along scientific lines, would ask himself, What is the value of this property and what will be my earning if I assume a fair rate of return to be, for example, 8%?

Then $R = .08V$

$$V = a + .08bV$$

$$V = \frac{a}{1 - .08b}$$

and $$R = \frac{.08a}{1 - .08b}$$

If the relation between V and R is more complex the problem is the same although the computations are more difficult.

If therefore Professor Hale's "is the result of" means Value equals Return divided by fair rate ($V = R/f$), I plead not guilty to his charge of reasoning in a circle and explain that that is not the sense in which "value" is used.

If "is the result of" means anything else, I must merely ask the Professor to consult with some one of his colleagues in the department of mathematics and be assured that the determination of value for two unknowns, connected by a non-homogeneous equation, on the basis of an assumed relation between them (such, for example, as that one shall be 8% of the other) is the perfectly proper and logical process known as the solution of two simultaneous equations, taught in its simpler forms early in the high school and free from any suggestion of reasoning in a circle.

But the commercial world does not usually work by mathematical formulae. The prospective investor in a competitive field determines first of all the present-day cost of planning, designing, purchasing, and erecting a duplicate or equivalent plant ("bare bones cost"): to this he adds the cost of planning, assembling, and training a staff; the cost of attaching business; and the total or partial loss of income during the development period (going value). The sum of bare bones cost and going value is total value based on the assumption of a normal rate of return, the actual rate of return entering into the computation only in so far as it measures or indicates the perfection of the plant and organization, and consequently the difficulty of duplicating it. The price he offers may be raised or lowered (usually merely to a minor degree) by consideration of the rate of return the business is actually earning.

It is this last element only, the difference (positive or negative) between computed value and price offered, which is affected by the limitation of rate of return, whether the limitation be by natural action of competition, contractual relations already assumed, or public authority.

Therefore when a utility, informed that it may earn only a fair return, asks the courts "on what?" the courts reply, "on what you would pay or could sell for if it were a competitive business held down by competition to (for example) an 8% return. If you actually paid less than this we will permit the public to cut this figure somewhat, if you actually paid more than this we will permit you to boost it somewhat; the cut or the boost depending upon all the circumstances of the case."

This answer may not appeal to Professor Hale, but it certainly does not involve any reasoning in a circle or justify a sneer at the intellectual capacity of the court.

It may surprise Professor Hale to know that many public utility men agree with Justic Brandeis that in the long run the public utilities would fare better if the rate of return could be based upon the prudent investment, nor should it be forgotten that the public utilities have been driven from this position by court decisions forced upon them by their opponents. But the only protection which the utilities have against confiscatory rates is to be found in the State and Federal constitutions, and there only in those clauses which are interpreted to forbid the taking of private property without due compensation. If property is protected, it is the property which a man now has, not that which he had yesterday or may have tomorrow, and the entire line of condemnation

cases for public utility, municipal, State, and Federal purposes establishes the fact that where private property is taken for public use its value is to be measured at the time of the taking.

Justice Brandeis recognizes the difficulty and attempts to show that the property devoted to the public use is the capital invested and not the physical units today employed for that purpose. In other words, apparently he recognizes that the value is to be determined as of the time of the taking but refers the taking back to the time of the investment rather than the time of the fixing of the rate, heretofore accepted as the time of the taking. The question so raised is an extremely interesting one and will undoubtedly lead to much discussion, but for those of us who must deal with valuation problems in this decade it becomes, since its rejection by the Supreme Court, academic rather than practical.

W. H. MALTBIE.

The Supreme Court's Traditions of Dissent

Cambridge, Mass., July 16.—To the Editor: Some of your recent correspondents have called into question the propriety, not to speak of the wisdom, of dissenting opinions in Constitutional cases, and have naively suggested the suppression of dissents as a remedy for "five-to-four" decisions by the Supreme Court. Such a proposal seeks to subvert the historic tradition of the Court which your correspondents profess to revere. Let me avouch two of the greatest authorities: .

> "I am of the opinion" wrote Mr. Justice Story in *Briscoe* v. *Bank of Kentucky*, 11 Pet. 257, 350, "that upon Constitutional questions, the public have a right to know the opinion of every judge who dissents from the opinion of the court, and the reasons of his dissent."

And after his succession to Marshall's place, Chief Justice Taney writes:

> "It has, I find, been the uniform practice in this court, for the justices who differed from the court on constitutional questions, to express their dissent. (*Rhode Island* v. *Massachusetts*, 12 Pet. 657, 752.)

This practice has been unbroken in the history of the Court. If some of your readers need to be reminded how the duty of expressing dissenting opinions has been discharged, by some of the great figures in the later history of the Court (still remaining, however, in the uncontroversial period of the past) let them examine the dissenting opinions of Mr. Justice Miller. Out of seven hundred eighty-three opinions rendered by him in the twenty-eight years of his Associate Justiceship, one hundred sixty-nine are dissenting opinions, (Gregory's Samuel Freeman Miller, VIII).

FELIX FRANKFURTER.

A Correction

Lockport, N. Y., July 28.—To the Editor: On p. 415 of the July, 1923, number of the JOURNAL, I regret to say that I have misquoted Mr. Justice Holmes. He said:

"I do not think the United States would come to an end if we lost our power to declare an act of Congress void. I do think (not "I do *not* think") the Union would be imperiled if we could not make that declaration as to the laws of the several states. . . ."

Very truly yours,

CUTHBERT W. POUND.

Objective and Subjective Doubt

Salt Lake City, June 26.—To the Editor: The editorial in the May issue of the JOURNAL entitled "Four to Five Decisions" suggests an inquiry as to whether the determination of the existence of a doubt upon which the Supreme Court should refrain from declaring a legislative act unconstitutional does not in the last analysis resolve itself into a simple matter of evidence.

In the editorial on the same subject in the April number of the JOURNAL you quoted from Mr. Justice Washington in Ogden vs. Saunders (12 Wheat. 213) as follows:

> The acts of the legislature are presumed to be valid and the *court* should not declare them unconstitutional until their violation of the Constitution is shown beyond a reasonable doubt. (Italics ours.)

From this language and the language quoted from other decisions, it seems that the final decision as to whether there is a doubt respecting unconstitutionality should be resolved from the standpoint of the court as a whole, rather than from the standpoint of the individual members. Justice Washington did not only mean that:

> The acts of the legislature are presumed to be valid and not any of the judges of the courts should declare them unconstitutional until their violation of the Constitution is shown beyond a reasonable doubt.

He said more than that. He held that the *court* should not declare it invalid if the doubt appeared. The duty to declare on the constitutionality of a law is ultimately the court's duty. The duty of the individual member to determine whether he is free from doubt should be a preliminary to determining whether there is any doubt in the court in reference to the question. If those members who have no doubt as to the unconstitutionality find that any of their colleagues are equally convinced that the act is constitutional, then they are presented with evidence that there is a reasonable doubt respecting the constitutionality of the act in question, even though there is no doubt as to the state of their own minds. It follows that, since the declaration to be made is one for the court and not for the individual members, those members who have no doubt as to the unconstitutionality could vote for a decision on the part of the court holding the statute constitutional, not because they thought it was, but because they were presented with sufficient evidence of an authoritative kind that there was a doubt regarding its unconstitutionality. The court would then apply the principle stated by Mr. Justice Washington, and declare the act not unconstitutional because it was not shown beyond a reasonable doubt that it was a violation of the Constitution.

The question still remains as to the quantum of evidence which should be required before the court should hold that there was a reasonable doubt. Theoretically one dissenting vote in favor of the constitutionality should be sufficient, especially regarding the eminence of the legal judgment of the men who constitute the members of the Supreme bench. Pragmatically two dissenting votes might be considered sufficient. In my opinion an act should not be declared unconstitutional as long as there are three judges who think that it is constitutional, that is, not until there is a seven to two vote in favor of unconstitutionality.

Looked at in this way, perhaps the idea of Mr. Frederick G. Bromberg, appearing in his letter published in your May number, that the Sureme Court

itself could make a working rule governing itself so as not to declare either a state act or a federal act unconstitutional if at least two members of its body hold a different opinion, may be tenable.

One can argue with all the force and subtlety possible in favor of a four to five decision, but to the intelligent layman the common sense fact still remains that no court can have declared an act unconstitutional because it found it so beyond a reasonable doubt, when four out of nine of that court have found it constitutional beyond a reasonable doubt. The very proposition tends to weaken the confidence of the layman in the soundness of our judicial decisions. The difficulty is largely removed if we define the doubt from an objective rather than subjective standpoint.

JAMES H. WOLFE.

What Marshall Meant by "Doubtful Case"

Milwaukee, Wis., June 7.—To the Editor: Your editorial entitled "Four to Five Decisions", in the April number of the JOURNAL, and the comments of your four correspondents on that subject, in the May number, are interesting and timely.

I am venturing to suggest, however, that those correspondents were in error who argued that in any case where another court has held the act in question to be constitutional, or in any case where a minority of the justices of the Supreme Court are of the opinion that the act is constitutional, the court is bound to regard the case as being "doubtful" and hence, according to its own rule, as precluding a decision adverse to the constitutionality of the act involved. The opposite view is predicated by your correspondents upon the declaration of the Supreme Court in the Dartmouth College Case, that "in no *doubtful* case would it pronounce a legislative act to be contrary to the constitution", and upon similar language used by the court in certain other cases.

The error of that view, as I see it, consists in assigning to the word "doubtful", as used by the court, a meaning not intended,—a meaning, indeed, which it could not have. In a court composed by several judges the decision necessarily rests with the majority, small or large, where the judges are divided in opinion. Such majority constitute the court for the purposes of the particular decision, and so far as the efficacy of the majority's decision is concerned the views of the minority are merely personal and, strictly speaking, unofficial. Therefore, what Chief Justice Marshall meant by the words above quoted manifestly was that in no case in which such *majority* were "doubtful" would the court pronounce a legislative act to be contrary to the constitution. Certainly, as it would seem, must this have been the meaning of the Chief Justice as regards a decision by a lower court upholding the constitutionality of a statute, since to say that such decision would render the case a "doubtful" one within the import of that word as used in the connection mentioned would be to say that the Supreme Court really could not review, but only formally affirm, such a judgment or decree. It is no less plain, as I perceive it, that, in the instance of a divided court, it was solely to the state of mind of the majority that the Chief Justice referred when he said that in no "doubtful" case would an act be held unconstitutional.

It seems to me, therefore, that, whatever validity other arguments in favor of discontinuing four to five decisions in cases involving the constitutionality of statutes may possess,—and I'm far from being convinced that there are not cogent ones,—there is no merit in the one based upon the declarations of the Supreme Court of which that above quoted is a sample.

JAMES QUARLES.

"The Presumption of Constitutionality"

Philadelphia, Pa., June 9.—To the Editor: Thank you for your editorial on the subject of "Four to Five Decisions." The Borah proposal is to transfer from the judiciary to Congress a portion of the judicial power now exercised by the Supreme Court of the United States. Whether Congress has acted in pursuance of the Constitution is a judicial question, a question decided for nearly a century and a half by a majority vote just as all other questions, including the applicability of acts of Congress, have been decided. The disputable territory is not wide so far as regards the number of five to four decisions on acts of Congress. There have been only sixteen, eight upholding the Constitution, and eight upholding the act. But the territory being judicial territory the question is whether it should be transferred to the absolute power of politicians in Congress.

"The presumption of constitutionality" argument is unconvincing and unsound. This is not found in the Constitution but is a judge-made canon of construction, and like all canons must yield to the actual intent. The rule never meant all that is now claimed for it. The same judges who announced it have unhesitatingly applied the majority rule. Decision by the majority must be the rule whenever a matter is committed to the arbitration of more than two. "The presumption of constitutionality" rule is applied by each justice individually and he reaches his conclusion as to the meaning of apt phrases in the Constitution after due regard for this presumption. Indeed the real reverence for the Constitution would seem to minimize rather than extend the presumption, since after all the most important thing in our world of law is that there shall not be abated by one jot or tittle aught of the substance of the rights secured by our fundamental law. After all Congress is a limited agency hedged about, the nineteen express grants of legislative power being accompanied by some 70 denials of authority. Congress is not even a general agent of the people. The Constitution is the Supreme Law of the land. Its meaning is for the judicial power, and to prohibit the judicial power from construing and supporting the Constitution as in other cases, is to discriminate against the Constitution as compared with other instruments, and in so far as the power of the Supreme Court is thus limited, to confer such judicial power so taken from the Supreme Court to Congress, a political body acting primarily from political considerations.

IRA JEWEL WILLIAMS.

Not a Recent Discovery

Washington, D. C., June 13.—To the Editor: The present critics of the Supreme Court of the United States seem to think they have discovered something in their contention that a court should not have the power to declare a legislative act to be unconstitutional, but they are not the originators of the doctrine.

In 1786 an act of the Rhode Island legislature was held to be in violation of the state constitution and the judges of the Supreme Court were impeached but not successfully.

In 1807 and 1808 the judges of the Supreme Court of Ohio were impeached, but unsuccessfully, because

they had held to be unconstitutional an act of the state legislature.

The history of these cases is summarized in Cooley's Constitutional Limitations (5th edition) top page 194.

The decisions alluded to were savagely attacked in the respective states, and the same arguments were advanced that are used today.

L. T. MICHENER.

An Argument From the Concrete

New York, June 26.—To the Editor: I have been much interested in the discussion in editorials in your paper in regard to the proposal to limit the powers of the Supreme Court to declare invalid Acts of Congress and of State Legislatures.

It seems to me that people who propose these changes lose sight of the fact that our Supreme Court is not allowed to pass on abstract questions. If after passage of an Act the same could immediately be submitted to the court, there might be some justification for holding that upon such application the court would be constrained to call the Act valid unless a certain number, more than a majority, would concur in holding the same unconstitutional. I believe certain foreign tribunals have the power to pass on questions in that way. Our court, however, has only the power to pass upon actual cases as they arise and they usually affect individual rights. Now, it seems to me that it would put an undue burden upon an attorney in advising his client what to do where a question of a statute was involved, if this attorney were obliged not only to decide whether a statute is, on its face, valid or invalid but also should be compelled to guess whether its invalidity would be declared by five judges or by more than five. Further, it seems to me that where a case came up for decision before the Supreme Court, the court would be put in a very poor light if it should be compelled to say to defendant in a criminal suit, "You have committed a certain act; a majority of us are convinced that you had a perfect right to do this act and that the statute prohibiting the same is invalid, but in view of the fact that only five of us think you have this right and four of us think you have not such a right, therefore, all of us must decide that you must go to jail or must pay a certain amount of money."

It seems to me if the court were put in this position, it would have to stultify itself and probably the result would be that in a great many cases where the majority believes that the law is unconstitutional, one of the minority would vote with the majority against his better judgment so as to save the face of the court.

JESSIE W. EHRICH.

Right Way to Administer Oath

Seattle, Wash., June 21.—To the Editor: Referring to the letter of W. W. Thum published in your issue of June 1923 in which he refers to the suggestion of Miss Fleming, librarian of the Louisville law library. I would like to say that I think the suggestion is a very good one.

Some years ago I was engaged in the trial of a case in which the question of a line fence was at issue and one of the witnesses was, I am satisfied, prepared to swear falsely in support of the contention as to the fence being the true line. The clerk of court attended in person and administered the oath. It was not a perfunctory rattling of the words but he spoke the words slowly and with emphasis and I could see the witness wilting, and when the oath was administered and the witness started to testify, he surprised his counsel and testified to the exact truth and there was no question about the application of the law, but I am satisfied if the usual oath had been administered the witness would have sworn falsely and there would have been some question about the matter.

OVID A. BYERS.

Duty of the Bar Associations

San Francisco, Cal., April 21.—To the Editor: It does seem that now is the time, if ever, for the lawyers of this country, through their Bar Associations, to come to the rescue of the Constitution, the Supreme Court and the very foundations of our institutions.

A few days ago there appeared in our local papers, as a news item, the announcement that one of our most estimable and public spirited women—a leader of women and president of one of the numerous women's clubs of this community—had attacked the members of the Supreme Court, who participated in the majority opinion in declaring the women's minimum wage scale of the District of Columbia unconstitutional. She is reported as having said, at a public gathering, that the majority of the court were under the control of corporate interests.

It was just a day or two afterwards that the President of the National Chamber of Commerce, in an address delivered here, before the local Chamber of Commerce, boldly announced that, practically, all of the important measures which he enumerated as now being before the country for settlement must be settled by the business men of the country, as contradistinguished from the labor men, the farmers "bloc" and the other ninety and nine odd millions of American citizens, who do not belong to any kind of a "bloc."

On top of all this, a few days ago one of our morning papers contained a most scurrilous and uncalled for attack upon the personal integrity of our highly respected, beloved and honored Chief Justice. Of course, all of us do not always agree with the majority of the Supreme Court, in all matters, but it does seem that now is the time, if the Bar Associations of the country are to justify their existence by constructive work, composed as they are of American citizens and practicing attorneys, trained and steeped in a deep reverence for our basic institutions, to go forth and use every effort in every legitimate way, to save from attack of the ill-informed, the very foundations of our Government, now so boldly, generally and ignorantly attacked.

WILLIAM P. HUBBARD.

In his annual report as retiring president of the St. Louis Bar Association, Mr. Guy A. Thompson recommended that a special committee be appointed to make a survey of the administration of criminal law in St. Louis. He also recommended the appointment of a committee to propose amendments to the rules governing the "primary" among members of the bar for the recommendation of judicial candidates; organizations of a speakers' bureau to spread information about the Association's work to curb "ambulance chasers," and also its efforts to promote higher standards of legal education; and investigation of the practicability of the Association acquiring its own home

STATE AND LOCAL BAR ASSOCIATIONS

Ohio Association Favors Higher Legal Education Standards and Disapproves of Non-Partisan Nomination and Election of Judiciary—Washington State Association Meets at Vancouver, B. C.—Kentucky Acts to Relieve Appeals Court Congestion—Justice Sutherland Speaks at Utah Meeting—Roscoe Pound Makes Address in Wisconsin—Annual Meetings in Other States

ARKANSAS

Twenty-Sixth Annual Meeting Held at Hot Springs—President Speaks on "Law Enforcement"

The 26th annual meeting of the Bar Association of Arkansas was held in the Eastman Hotel at Hot Springs on May 31st and June 1st. The address of welcome was delivered by Judge Scott Wood of Hot Springs and the response on behalf of the Association by Mr. W. A. McDonnell, of Little Rock. The president, J. V. Walker, of Fayetteville, delivered the annual address, the subject being "Law Enforcement."

Addresses were also delivered by Mr. John W. Grabeil of Fayetteville, on the "Lawyer and the Public"; by Captain Walter Chandler of Memphis, on "Mr. Justice Clifford"; by J. B. McDonough of Fort Smith, on "The Judicial Power of the Constitution"; and by C. A. Walls of Lonoke, on "The Proposed Amendment for the Relief of the Supreme Court". An informal address was delivered by W. B. Smith of Little Rock on "The Good Roads Question in Arkansas".

The annual banquet was held at the Eastman Hotel on the evening of May 31st and was well attended. The president of the Association presided as toast-master, and responses to toasts were given by C. Floyd Huff of Hot Springs; C. E. Daggett of Marianna; and J. W. Morrow of San Antonio, Texas.

The following officers were elected for the ensuing year: C. E. Daggett of Marianna, President; S. H. Mann of Forrest City, Vice-President; R. R. Lynn of Little Rock, Secretary; and J. Merrick Moore of Little Rock, Treasurer.

INDIANA

Annual Meeting at West Baden—William Marshall Bullitt Delivers Annual Address—Special Committee Reports Work of Popular Education in Constitution Being Actively Carried On

Report of the Special Committee on Popular Education in the Fundamentals of the Constitution was one of the most interesting features of the twenty-seventh annual meeting of the Indiana State Bar Association, held at West Baden on July 5 and 6. This report showed that a thorough organization of the state had been made for active cooperation in the work of members of the bench and bar. Lawyers have been secured in every county to address civic and social organizations, addresses are to be given before the student body of all the schools, and through the cooperation of the state superintendent of instruction talks will be given in all normal schools and colleges. The report stated that the committee was working in connection with the American Bar Association.

President Cassius C. Shirley, of Indianapolis, spoke on "Democracy of the Federal Constitution," and in the course of his address voiced a condemnation of the Ku Klux Klan and all other organizations which claim to enforce law without working through the law as a menace to all organized government. The annual address was delivered by Hon. William Marshall Bullitt, of Louisville, Kentucky, former Solicitor-General of the United States. Papers were read by Judge James A. Collins and Judge Elmer Q. Lockyear, on the legal problems connected with the treatment of criminals and defectives. Papers were also read by Hon. John M. Smith and Chief Justice Louis B. Ewbank, of the Supreme Court of Indiana. At the annual banquet of the Association, Hon. William Marshall Bullitt and others spoke. Other social events of the meeting were greatly enjoyed.

KENTUCKY

Bar Association Acts to Relieve Congested Docket of Court of Appeals—Hon. Frank M. Lowden Makes Powerful Plea for Return to Faith of the Fathers in the Constitution

The Kentucky State Bar Association held its twenty-second annual meeting at Covington, Kentucky, on Thursday and Friday, July 5th and 6th, 1923. Former Governor Frank O. Lowden, of Illinois, delivered the principal address.

It was a powerful plea, urging a return to the faith of the fathers who wrote the Constitution of the United States, and warning against the present tendency away from the idea of representative Government. He also deplored the present tendency to centralize all power in the Federal Government, and the attacks which we hear, from time to time, on the Supreme Court of the United States.

Perhaps the most important action taken by the Association, was the adoption of a report of two committees on the subject of the relief of the present congested condition of the docket of the Court of Appeals of Kentucky. In brief that report recommended, and the Association approved, the following methods of relief:

Temporary Relief

(1) It was recommended that in cases where the decision of the lower court is affirmed, no written opinion shall be required during a period of four years, unless some novel question is involved or the court feels it expedient to write an opinion.

(2) The court should be allowed to raise the salaries of its clerical assistants to an amount not exceeding $200 per month.

(3) The Court should be allowed to appoint additional commissioners not exceeding four in the aggregate.

Permanent Relief

(1) A constitutional amendment should be adopted, authorizing the increase of the Court of Appeals from seven members to ten members sitting in

three divisions of three Judges each, and the Chief Justice presiding over all three divisions. The unanimous decision of any one division shall be the decision of the court.

(2) In addition to the recommendations contained in the committee's report, a resolution was adopted, recommending that the Court of Appeals require the records in that court to be abstracted.

The President's address was delivered by Judge Richard C. Stoll, of Lexington, and addresses were delivered by the following persons as outlined in the program: "Estate Taxes", Judge McKenzie Moss, Assistant Secretary of the Treasury; "Some Great Lawyers of Kentucky", T. P. Carothers; "The Law of Aviation", E. F. Trabue; "Responsibility of Directors of Corporations", B. R. Jouett; "The First Land Court of Kentucky", Judge Samuel M. Wilson.

The following officers were elected: President, John F. Hager, Ashland; Secretary, J. Verser Conner, Louisville; Treasurer, D. Collins Lee, Covington; Vice-Presidents: 1st dist., Ben T. Davis, Hickman; 2nd, Lawrence B. Tanner, Owensboro; 3rd, W. Porter Sims, Bowling Green; 4th, Robert F. Vaughan, Louisville; 5th, George R. Hunt, Lexington; 6th, Thomas D. Slattery, Maysville; 7th, B. R. Jouett, Winchester.

Executive Committee: W. P. Kimball, Lexington; R. C. P. Thomas, Bowling Green; John C. Doolan, Louisville; Hugh Riddell, Irvine; Victor L. Kelley, Bardstown.

J. VERSER CONNER, Secretary.

NEW JERSEY

President of State Association Appoints Delegates and Alternates to Minneapolis Meeting

Maximilian T. Rosenberg, president of the New Jersey Bar association, has announced the appointment of the following delegates and alternates from the New Jersey State Bar association, to the forty-sixth annual meeting of the American Bar association: Wayne Dumont, Paterson; Edward L. Katzenbach, Trenton; Rynier J. Wortendyke, Jersey City. The alternates are: George A. Bourgeois, of Atlantic City; John R. Harding, Newark, and former Judge Mark A. Sullivan, of the New Jersey court of errors and appeals, Jersey City.

NORTH CAROLINA

Twenty-Fifth Annual Meeting State Association—A. Mitchell Palmer Makes Principal Address

The North Carolina Bar Association held its twenty-fifth annual meeting at Mayview Manor, Blowing Rock, N. C., on July 5, 6 and 7, 1923. Over three hundred lawyers, besides two hundred ladies, made up the largest meeting in the history of the Association. One hundred and twenty-five new members were admitted, making a total membership of over a thousand.

The address of welcome was delivered by U. S. District Attorney Frank A. Linney. It was responded to by Hon. Jno. G. Dawson, of Kingston, Speaker of the House of Representatives. The address of President L. R. Varser dealt with the North Carolina Judicial system, pointing out needed changes. Other addresses were delivered by Mr. Walter Clark, Jr., of the Charlotte Bar, and Mr. R. E. Denny, of the Greensboro Bar. Both dealt with the part taken by North Carolina lawyers in the world war.

Judge W. F. Harding, of Charlotte, discussed the feasibility of abolishing the rotation system of Superior Court judges. The Association before adjournment went on record in favor of the recommendation of abolishing the rotation system and also endorsed President Varser's recommendation limiting argument of counsel to juries.

The principal address was made by Hon. A. Mitchell Palmer, former U. S. Attorney General. He was introduced by U. S. Senator Lee S. Overman, former chairman of the Senate Judiciary Committee. Mr. Palmer spoke extemporaneously on the "Relation of the United States to the European Problems" and for nearly two hours held the undivided attention of his audience. Perhaps North Carolina has never heard a more convincing exponent of the French policy. He was unflagging in his condemnation of Germany, a land where revenge and a determination to overpower and rule the world exist.

Following a business meeting on July 7, a motor ride was taken along the face of Grandfather Mountain to Linville where, at an altitude of five thousand feet, a delightful luncheon was given the members.

The following officers were elected for the next year: President E. S. Parker, Jr., of Graham; Vice-Presidents: Walter Clark, Jr., of Charlotte; Prof. A. C. McIntosh, of the State University Law School, Chapel Hill; William Graves, Winston-Salem; Secretary and Treasurer, H. M. London, Raleigh. Ed. M. Land of Goldsboro and Maj. Geo. Butler of Clinton were appointed to membership on the Executive Committee, the other members of the committee holding over being John J. Parker, Charlotte; R. L. Smith, Albemarle; A. L. Quickel, Lincolnton; and J. K. Warren, Trenton.

The following were appointed delegates to the American Bar Association: A. L. Brooks, Greensboro; R. L. Smith, Albemarle; Ex-Judge Geo. Rountree, Wilmington, with the following alternates: John E. Woodward, Wilson; T. S. Rollins, Asheville; Owen G. Guion, New Berne. The following were appointed delegates to the Conference of State and Local Bar Association Delegates: Larry I. Moore, New Berne; A. B. Andrews, Raleigh; W. M. Person, Louisburg, the following being the alternates: J. Crawford Biggs, Raleigh; W. M. Hendren, Winston-Salem, and Mark W. Brown, Asheville.

HENRY M. LONDON, Secretary.

OHIO

State Association Indorses Higher Standard of Legal Education—Opposes Non-Partisan Method of Nominating and Electing Judges

The first session of the Annual Meeting of the Ohio State Bar Association, held at Cedar Point, Ohio, July 10th, brought together one of the largest conventions of the profession in the history of this state.

The activities and accomplishments of the Association during the past year were reviewed in the address of President George B. Harris of Cleveland, Ohio. The work done included the establishment of permanent headquarters at the State Capital and the employment of a full-time executive secretary. The organization of many local associations was accomplished, with the result that there are only three of the eighty-eight counties in the state without bar associa-

tions. President Harris urged the Association to present statutory organization to the next session of the General Assembly. He also recommended the creation of a standing committee on uniform state laws, and a complete reorganization of the Association to meet modern requirements, by setting up a purely representative form of association government with the county organization for the unit. He added that nothing had been done by the committee appointed to work for a constitutional amendment to enlarge the jurisdiction of the Supreme Court, the inaction probably being due, he said, to the fact that the court itself had been enlarging its own jurisdiction.

Recommendation that candidates for admission to the practice of law in Ohio be required to have completed at least two years of work in a college of arts and science, in addition to the three years of law school or four years of night or office work already prescribed, was made by the Association. Action came in the form of adoption of the report of Prof. George W. Rightmire of the Ohio State University, Chairman of the Committee on Legal Education. The report which provided that the Supreme Court be requested to make such requirement was adopted after considerable difference of opinion had been aired on the floor.

The Association at this meeting definitely went on record as opposed to the non-partisan method of both nominating and electing candidates to judicial offices.

First the Association refused to indorse a proposal that the laws of the state be amended so as to provide for nomination of judicial candidates on a non-partisan ticket, and immediately afterwards recommended the abolition of the present system of electing judges on a non-partisan ballot.

In its refusal to record itself in favor of the non-partisan nominating system, which would have left party designations off the primary judicial ticket and resulted in the two candidates receiving the highest number of votes, regardless of party, being placed on the ballot at the regular election, the membership of the Association overruled a recommendation of its Executive Committee.

The stand taken against the present non-partisan method of electing judges came in the form of passage of a motion made by former Judge Frank Geiger of Springfield, that the legislature be requested to pass legislation requiring that judicial ballots bear the party affiliation and home city of each candidate after the name.

During the afternoon session on the second day of the convention the Association heard Job E. Hedges of New York, former candidate for governor of that state, declare that "government is a question of individual responsibility"; that government is made to "live under, not on," and that the great danger of government is not communism but in the action of the man "of high intelligence but low morals" who plays on the lack of knowledge of the average citizen to misinform him. "The solution of government," Mr. Hedges said, is to "get into the minds of the people the facts from which we demand they form an opinion" and return to thinking "in heart beats instead of in figures." The convention in the morning heard Chief Justice Floyd E. Thompson of the Illinois Supreme Court condemn those who seek to foist their private views of conduct on the whole people and inveigh against "federal government wreckers and tax eaters."

William L. Hart of Alliance will become president of the Association as a result of elections. J. L. W. Henney of Columbus was re-elected secretary and John F. Carlisle, Columbus, treasurer. The following vice-presidents were elected: Allen Andrews, Hamilton; H. S. Ballard, Columbus; Judge J. C. Hover, Bellefontaine; A. T. Holcomb, Portsmouth; William Voegel, Mansfield; N. R. Harrington, Bowling Green; Judge Paul J. Jones, Youngstown; W. T. Dunmore, Cleveland, and J. B. Taylor, Wooster.

Members of the Association's executive committee, elected at district sessions, are: Albert D. Alcorn, Cincinnati; former Judge Frank Geiger, Springfield; Judge Grant E. Mouser, Marion; A. R. Johnston, Ironton; Charles B. Hunt, Coshocton; G. Ray Craig, Norwalk; Judge W. W. Cowen, St. Clairsville; Louis H. Winch, Cleveland; W. E. Slabaugh, Akron.

The report of the committee on Judicial Administration and Legal Reform, as adopted by the Association, recommended passage of a bill by the Legislature regulating expert witnesses and prohibiting compensation greater than that allowed other witnesses. John A. Cline, Cleveland, member of the committee spoke in support of this proposition. The report also recommended that all disbarment proceedings be instituted either in Supreme or Common Pleas Courts, because the Court of Appeals cannot disbar an attorney except from the court in which he was heard. An amendment to Association's Constitution was adopted creating a committee on Uniform State Law whose duty is to assist in promoting uniformity of legislation among the different states.

Newton D. Baker of Cleveland, was toastmaster at the Association banquet held the evening of July 11th, at which President-elect Hart spoke of "The Future"; Congressman James T. Begg of Sandusky on "Present Trend in Government"; Job E. Hedges on "Reflections"; Chief Justice Floyd E. Thompson of Illinois on "Sense and Nonsense", and Federal Judge Maurice Donahue on "The Lawyer and His Relation to Society."

The final session of the Convention was in the hands of the Judicial Section. The program included four addresses on "Our Problems", with Hon. J. I. Allread, Columbus, representing the Court of Appeals, Hon. Grant E. Mouser of Marion, the Court of Common Pleas, Hon. R. S. Woodruff, Hamilton, the Probate Court, and Hon. J. P. Dempsey, Cleveland, who spoke on the problems of the Municipal Court.

The Probate Judges Association of Ohio at its next annual meeting will be asked to champion legislative action requiring a clean bill of health from applicants for marriage licenses before licenses to wed are granted.

In discussing the problems of the probate court Judge R. S. Woodruff of Butler county declared that every county should have its own penitentiary, and predicted if this were done crime would decrease. "There should be," he said, "a clean bill of health demanded of persons desirous of marrying before a license is granted. Our Ohio marriage laws today are a farce." Judge Mouser urged that the common pleas judges and bar associations unite in demanding legislation for a living wage for judges. He said a number of judges had resigned and that two-thirds of those now on the bench would resign in the near future because of being underpaid. Judge John P. Dempsey declared that one of the problems the judicial council of Ohio must solve is a method of expediting court business in centers of large population.

The Judicial Section re-elected Chief Justice C. T. Marshall of the Ohio Supreme Court, chairman.

President Harris, as the last act at the closing meeting of the Association, appointed Judge C. A.

Reid of Washington, C. H.; A. D. Alcorn of Cincinnati, and Smith W. Bennett of Columbus, delegates to the American Bar Association. Alternates appointed are H. A. Ramey of Toledo; F. S. Monnett of Columbus, and John A. Elden of Cleveland. Following the close of the session members of the bar and their families were given a boat ride to Put-In-Bay.

TEXAS

Interesting Program Provided for Annual Meeting at Beaumont

The annual meeting of the Texas State Bar Association was held at Beaumont on July 3, 4 and 5. President W. A. Wright took as the subject of his annual address "The Texas Bar Association—A Little of Its History, Something of Its Needs, Opportunities, Duties and Obligations." Other addresses on the program were: "The American Law School," by Dr. George C. Butte of Austin; "A New Revised Statutes," by C. S. Bradley; "The Story of the American Flag," by W. O. Hart of New Orleans; "American Citizenship," by R. E. L. Saner of Dallas; "Massachusetts Trusts," by Prof. Ira D. Hildebrand of Austin; "Living According to Law," by Hon. R. L. Batts of Pittsburgh, Pa.; "Law as a Science," by Hon. Stephen H. Allen of Topeka, Kansas; "The Jurisdiction of the Supreme Court," by C. L. Black of Austin.

The address of welcome to the Association was delivered by Mayor Steinhagen on behalf of the city of Beaumont and by Mr. Leon Sonfield on behalf of the Jefferson County Bar Association. The response was made by Mr. H. L. Moseley of Weatherford. The banquet and other social events added greatly to the success of the meeting.

UTAH

Annual Meeting at Salt Lake City—Mr. Justice Sutherland Speaks on Workings of the Supreme Court and Its Power to Declare Statutes Unconstitutional

The annual meeting of the State Bar Association of Utah was held at Salt Lake City, Utah, June 18, 1923. At the business meeting in the afternoon, E. M. Bagley, president of the association, spoke briefly upon "Assaults on Federal Jurisdiction." Congressman E. O. Leatherwood also spoke briefly upon the question of requiring a certain number of the Justices of the Supreme Court of the United States to concur in decisions upon Constitutional questions. Congressman Don B. Colton, also addressed the association on some ill-advised legislation introduced by lawyers in Congress as well as in the State Legislatures.

The following officers were elected for the ensuing year: President, Waldemar Van Cott; First Vice-President, Geo. H. Smith; Second Vice-President, Mr. Frank E. Holman; Secretary, Mr. Calvin W. Rawlings; Treasurer, Mr. Ray Van Cott.

At the evening session a banquet was provided the members of the Association. Mr. Justice George Sutherland of the Supreme Court of the United States, a former member of the Association, and a member of the bar of the State of Utah, was the guest of honor. Other guests present were United States District Judge Tilman D. Johnson, Justices of the Supreme Court of the State of Utah, and District Judges: Honorable Chas. R. Mabey, Governor of the State of Utah, Honorable C. C. Nelson, Mayor of Salt Lake City, United States Senator Reed Smoot, United States Senator W. H. King, Congressman E. O. Leatherwood and Congressman Don B. Colton, and Samuel H. Kinsley, President of the Colorado State Bar Association.

Mr. Kinsley briefly addressed the members of the Association and conveyed to them the good wishes of the members of the State Bar Association of Colorado. He also conveyed to Mr. Justice Sutherland the good will of the Colorado legal fraternity.

Mr. Justice Sutherland then addressed the members of the Association, speaking first upon the workings of the Supreme Court, and then upon the power of the Supreme Court to declare statutes unconstitutional.

CALVIN W. RAWLINGS, Secretary.

VIRGINIA

Program of Thirty-Fourth Annual Meeting State Association

The thirty-fourth annual meeting of the Virginia State Bar Association was held at Natural Bridge, Virginia, on July 2, 3 and 4. President E. P. Buford, of Lawrenceville, spoke on "Federal Encroachments Upon State Sovereignty." The annual address was delivered by Hon. Sherman L. Whipple of Massachusetts on the subject, "Is Our Profession Becoming Unduly Commercialized?" On the second day of the meeting Judge Joseph F. Kelly of Bristol, president of the Virginia Supreme Court of Appeals, spoke on "An Inside View of the Work of the Virginia Supreme Court." The meeting closed with the customary annual dinner. Another enjoyable social event connected with the meeting was the reception by Mr. and Mrs. H. St. George Tucker to the members of the Association, their wives and daughters, at Col-Alto, Lexington, Virginia.

The following officers were elected: President, Mr. George Bryan, Richmond; Vice-Presidents: W. W. Old, Jr., Norfolk; Philip Williams, Winchester; W. W. Coxe, Roanoke; John L. Lee, Lynchburg; Charles T. Lassiter, Petersburg; Secretary and Treasurer, John B. Minor, Richmond. Members of the Executive Committee, J. Randolph Tucker of Richmond and Robert T. Barton of Winchester. Delegates to the American Bar Association—Wm. Kinckle Allen, Amherst; James H. Corbitt, Suffolk; James R. Caton, Alexandria.

WASHINGTON

State Association Holds Interesting Meeting at Vancouver, B. C.—British Columbia Bar Participates

The Washington State Bar Association and the British Columbia Bar held a joint meeting at Vancouver, B. C., on August 2, 3 and 4. Hon. Alexander M. Manson, Attorney-General of British Columbia, delivered the address of welcome, which was responded to by Hon. Carroll B. Graves of Seattle, Washington. President Preston M. Troy, of Olympia, delivered the annual presidential address. It was followed by an address by Sir Charles Hibbert Tupper K. C. M. G., of Vancouver, on "A Contrast of Certain Features of the Constitution of Canada and that of the United States." Other addresses on the program were: "The Simplification and Clarification of Our Law: The Program of a Revitalized American Bar and of the Newly Organ-

ized American Law Institute," by Dean Henry M. Bates of the University of Michigan Law School; Response, by A. H. MacNeill K. C. of Vancouver; "The Recent Extension of the Common Law Doctrine of the Guarding of Excavations Near Highways," by L. G. McPhillips, K. C. of Vancouver; "Governmental Regulation of Public Service," by E. V. Kuykendall, Olympia; "Taxation of Costs," by Edward W. Allen, Seattle; Address, Harold B. Robertson, of Victoria, B. C.; "Legal Digesting, Indexing and Reporting," by Arthur Remington, Olympia, Washington.

The social features of the meeting included a luncheon presided over by President Troy of the Washington State Bar Association, at which addresses were made by Hon. Tom W. Holman, assistant Attorney-General of the State of Washington, and Mr. Justice Murphy of the Supreme Court of British Columbia; an evening steamer cruise through the upper reaches of Howe Sound and out into the Gulf of Georgia; and a dinner to members of the bars of the State of Washintgon and the Province of British Columbia, presided over by Mr. F. G. T. Lucas, president of the Vancouver Bar Association. Mr. Charles Wilson K. C., spoke for the British Columbia bar and Major Charles O. Bates for the Washington bar.

The Prosecuting Attorneys Association of the State of Washington held its meeting at the same time and place. Major Malcolm Douglas, prosecuting attorney of King County, Washington, delivered the presidential address. Mr. Ewing D. Colvin of Seattle spoke on "Enforcement of Alien Land Laws"; Mr. H. G. Wood, Crown Prosecutor for the County of Vancouver, on "Criminal Law and Its Administration"; Mr. Chester A. Batchelor, Deputy Prosecuting Attorney of King County on "The Anti-Narcotic Laws." There was a round table discussion on "The Insanity Statute," led by Charles H. Leavey, of Spokane County, and another on "Inquisitorial Powers of Prosecutors," led by A. J. Gillis of Walla Walla County. There were also round table discussions during the meeting on "Budget Law" and "Bond Issues."

WISCONSIN

Dean Roscoe Pound Delivers Address on "Growth of Administrative Justice" at Annual Meeting—Resolution Adopted Reaffirming Faith in Our Institutions—Association in Prosperous Condition

The annual meeting of the Wisconsin State Bar Association held June 26, 27 and 28, at the cities of Janesville and Beloit, was a marked success in every way. The attendance exceeded that of any previous meeting, over 300 members and guests being registered.

The Association had the pleasure of listening to an address by Dean Roscoe Pound of Harvard Law School, who spoke at Beloit, Wednesday evening, June 27, upon the "Growth of Administrative Justice." He said that many had called attention to this phenomenon of late and had assumed that it involved grave dangers to the law. He urged that it was but part of a wider movement of which the growing leadership of the executive, the growth of administrative law making, the judicial development of standards in place of hard and fast rules, and individualized penal treatment, in place of the system of fixed sentences, were other phases. Individualized treatment in the concrete, rather than generalized treatment in the abstract, was becoming the mark of the present in every field of activity. In law it was called for by the change from the sparsely settled pioneer society, for which our legal institutions were given shape, to the crowded, interdependent, industrial society of today. The growth of administrative justice was a response to the demand of this change. The duty of the lawyer was not one of resistance to the inevitable process of individualizing the administration of justice; it was one of limiting the process to its legitimate field—human conduct and the conduct of enterprises—and of making the process more systematic and more scientific.

Martin J. Wade, United States District Judge of the Eastern District of Iowa, addressed the Association on the subject of the Defense of our National Institutions. Judge E. Ray Stevens of Madison, delivered a carefully prepared paper on the English Practice and Its Application to Procedural Reform in Wisconsin. A committee will be appointed to give this subject further study and report at the next meeting of the Association. Graham Stewart of the University of Wisconsin addressed the Association on America's New Foreign Policy.

The meeting closed with a banquet at which Malcomb G. Jeffris of Janesville presided as toastmaster. About 150 members and guests were present. Messrs. William P. McCracken of Chicago, Charles L. Fifield, Janesville, Judge E. T. Fairchild of Milwaukee, Francis E. McGovern of Milwaukee, and William J. Morgan, ex-Attorney General, were among those who were called upon for toasts. The occasion was a delightful one in every way.

The reports of the officers showed the Association to be in a very prosperous condition, more than 100 new members having been added during the year.

Among the important business transacted was the appointment of a Committee on American Citizenship, and the unanimous adoption of a resolution reaffirming belief in the safety and soundness of our judicial and governmental systems, especially that feature which reposes in the Supreme Court of the United States the powers which it has so long and so honorably exercised; also the belief that any amendment of the Constitution limiting the power of the Court would endanger our system of government, our cherished institutions, and the rights of American citizenship.

The following officers were elected: President, William A. Hayes, Milwaukee; Secretary and Treasurer, Gilson G. Glasier, Madison; Assistant Secretary, Arthur M. McLeod, Madison; Vice-Presidents: 1st District, A. R. Janecky, Racine; 2nd, Paul R. Newcomb, Milwaukee; 3rd, George E. Williams, Oshkosh; 4th, E. L. Kelly, Manitowoc; 5th, A. W. Kopp, Platteville; 6th, Jesse Higbee, La Crosse; 7th, C. H. Cashin, Stevens Point; 8th, H. H. Smith, New Richmond; 9th, F. R. Bentley, Baraboo; 10th, F. S. Bradford, Appleton; 11th, Wm. M. Steele, Superior; 12th, Paul N. Grubb, Janesville; 13th, Henry Lockney, Waukesha; 14th, Eben R. Minahan, Green Bay; 15th, Allen T. Pray, Ashland; 16th, Fred W. Genrich, Wausau; 17th, H. M. Perry, Black River Falls; 18th, John P. McGalloway, Fond du Lac; 19th, Alexander Wiley, Chippewa Falls; 20th, Harry R. Goldman, Marinette.

Amendment of the Law Committee, Francis E. McGovern, Milwaukee; Membership Committee, Joshua L. Johns, Appleton; Necrology Committee, Archie McComb, Green Bay; Publication Committee, Frank L. McNamara, Milwaukee.

The 1924 meeting of the Association will probably be held at Appleton.

Necrology

Prof. Raleigh Colston Minor, of the Law Department of the University of Virginia, and author of a number of books on jurisprudence, died at Charlottesville, Virginia, at the age of 54. He was born at the University of Virginia, and graduated from that institution in 1887. He practiced for three years at Richmond, then became assistant professor at the University and, later, full professor. In 1904, he was a delegate to the Universal Congress of Lawyers and Jurists held at St. Louis. Among Prof. Minor's works were: "Law of Tax Titles in Virginia," "Conflict of Laws," "Law of Real Property," "Minor and Wurts on Real Property," "Notes on Government and State Rights," and "A Republic of Nations."

Judge Thomas G. Windes, Dean of the Circuit Court of Cook County, Illinois, died at Winnetka, Illinois, on June 4 at the age of 75. He had been on the bench for more than thirty-one years. Judge Windes was born in Morgan County, Alabama, and left an academy in Huntsville at the age of sixteen to join Forrest's cavalry in the Confederate Army. He studied law at the close of the war at the University of Virginia and in 1870 was admitted to the Tennessee bar. He moved to Chicago after the great fire and in 1875 was admitted to the Illinois bar. In 1892 he was appointed to fill a vacancy on the bench and was thereafter chosen to judicial position at each successive election. One of the most famous cases that he decided was what is known as the "North Shore Boulevard Case." This litigation involved millions of dollars in property rights as well as difficult riparian and constitutional questions. Judge Windes' decision, which was affirmed by the Supreme Court, made possible the present enlarged recreation grounds of the City of Chicago.

Stephen C. Baldwin, prominent Brooklyn, N. Y., lawyer, died in that city on July 28 at the age of 59. Mr. Baldwin was known as a particularly able trial lawyer. One of the actions which brought him especially before the public was that in which he represented William Guggenheim in his suit for $10,000,000 against his five brothers. Mr. Baldwin was born in Foo Chow, China, where his mother and father were Methodist missionaries. His early education was received abroad and at Boston, after which he studied law in the office of Judge Clinton G. Reynolds and, later, of David Dudley Field. He was admitted to the bar in 1885. In 1914, he conducted an investigation of the management of Sing Sing Prison, which was followed in October of that year by the removal of the warden. He was a member of city, county, state and national bar associations. He is survived by a wife and two daughters.

Albert N. Eastman, Vice-President of the American Bar Association for the State of Illinois, died on July 20 at Culver, Indiana, as the result of injuries received in an automobile accident near Crawfordsville. Mr. Eastman was the senior member of the firm of Eastman, White and Hawxhurst. He was born at Kingsville, Ohio, in 1864, and came to Chicago in 1885 and began the study of law. He was admitted to the bar in 1887 and has practiced law continuously since that time. He was a member of a number of legal and fraternal organizations and was prominent in public activities. On receipt of news of Mr. Eastman's death, President Davis of the American Bar Association appointed Nathan William MacChesney, John T. Richards and Frederick A. Brown, all of Chicago, as a committee to attend the funeral. He is survived by a widow, one son and a daughter.

Hon. Oscar A. Trippet, Judge of the Federal District Court of Southern California, died on Sunday, July 15. Judge Trippet was a native of Indiana but went to California thirty-five years ago. He was educated at the University of Virginia and began the practice of law in his native state. At the age of twenty-one he was elected to the state senate. In 1887 he located in California, moving to Los Angeles in 1901. In 1914 President Wilson appointed him judge of the United States District Court, a position he held up to the time of his death. He was at one time president of the Los Angeles Bar Association and was recognized as an able lawyer and a man of high character. He became a member of the American Bar Association in 1899. During the earlier years of his membership he served successively as a member of the General Council, Vice-President for California, and as a member of the Local Council. During this time he also served on some of the important committees. Judge Trippet is survived by his widow and his son.